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WORK OF THE MISSISSIPPI SUPREME COURT FOR SEPTEMBER 1938, AND MARCH 1939 TERMS 1

THE TRIBETTE CASE ..... *T. C. Kimbrough* 134

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Mississippi Law Journal

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Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOL. XII OCTOBER 1939 No. 1.

THE WORK OF THE MISSISSIPPI SUPREME COURT FOR THE SEPTEMBER 1938, AND THE MARCH 1939, TERMS

I.

STATISTICAL SURVEY

*Fletcher F. Veazey, Jr.**

Table I of this survey was prepared by Hon. Tom Q. Ellis, and Hon. E. L. Shelton, Clerk and Deputy Clerk, respectively, of the Supreme Court. This table was compiled from the original records of the court and the writer gratefully acknowledges the assistance given him by the compilers. The other tables, appearing herein, were compiled from the cases carried by the Southern Reporter and contain only the cases therein reported.

Table II shows the disposition of the cases upon appeal and the Justice who wrote the opinion.

Table III is a topical analysis of the cases, by reference to the Justice writing the opinion. It should be borne in mind while consulting this table that the topic under which a case has been entered is not necessarily the only point involved or decided in the case, but it was necessary in many cases to draw an arbitrary line for the sake of tabulation.

Table IV shows the dissents and special concurrences. It is interesting to note that there were approximately five times more dissenting opinions for the last two terms of court than there were for the September 1937, and the March 1938, terms. These tables are published here only with the hope that it may be of interest to the bar and bench of the state.

* Note and Case Editor, Miss, L. J. The writer gratefully acknowledges the valuable assistance rendered by Mr. Phineas Stevens, Assistant Editor, Miss. L. J.

TABLE I

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TABLE II

	Anderson, J.	Ethridge, P. J.	Griffith, J.	McGehee, J.	McGowen, J.	Smith, C. J.	Per Curiam	TOTAL
Affirmed	32	49	25	33	17	13	50	219
Affirmed and Remanded	3	1	1	3	....	....	....	8
Affirmed on condition of Remittitur	1	....	1	....	....	....	....	2
Modified, and as modified, Affirmed	....	....	....	....	1	....	....	1
Affirmed in part, and Reversed and Remanded in part	....	....	5	1	1	....	....	7
Affirmed in part, and Reversed and Rendered in part	1	1	1	....	1	2	....	6
Reversed and Remanded	10	12	12	18	16	13	1	82
Reversed and Rendered	12	8	9	15	13	11	....	68
Reversed and Rendered in part, and Reversed and Remanded in part	....	....	....	1	....	1	....	2
Appeal Dismissed	....	1	1	....	1	....	....	3
Suggestion of Error Overruled	1	....	3	7	....	4	3	18
Motions Sustained	....	1	....	....	....	1	....	2
Motions Sustained in part, Overruled in part	....	....	....	....	....	....	1	1
Motions Overruled	2	....	....	....	1	2	1	6
Motions Dismissed	....	....	....	....	....	....	....	.....
TOTALS	62	73	58	78	51	47	56	425

TABLE III

	Anderson, J.	Ethridge, P. J.	Griffith, J.	McGehee, J.	McGowen, J.	Smith, C. J.	TOTAL
Agency	1	....	....	....	....	....	1
Appeal & Error	4	4	6	2	4	8	28
Automobiles	....	3	2	5	2	2	14
Banks & Banking	1	2	....	....	....	....	3
Bills & Notes	1	....	....	....	....	1	2
Carriers	....	1	....	2	1	....	4
Charities & Paupers	....	1	....	....	....	....	1
Constitutional Law	1	1	....	....	1	....	3
Contracts	1	....	5	1	1	3	11
Corporations & Partnerships	1	1	....	1	....	....	3
Counties and States	1	3	4	3	1	1	13
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Eminent Domain	2	1	....	....	....	....	3
Equity	3	7	2	2	1	1	16
Evidence & Witnesses	3	2	2	1	3	2	13
Homesteads	....	1	....	....	....	....	1
Infants	1	1	2	....	....	....	4
Insurance	2	3	3	3	2	2	15
Intoxicating Liquors	....	5	2	1	1	....	9
Marriage & Divorce	....	....	....	2	1	....	3
Master & Servant	3	3	....	5	2	2	15
Mortgages	2	3	1	6	....	1	13
Municipal Corporations	4	3	3	2	1	3	16
Officers	2	2	....	1	....	....	5
Practice and Procedure	3	3	....	5	2	1	14
Railroads	1	1	1	....	1	....	4
Real Property	6	1	5	2	1	....	15
Sales	....	2	2	2	2	1	9
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Torts	1	2	4	2	2	....	11
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TABLE IV

	Dissents with Opinion	Dissents without Opinion	Concurs in another Dissent	Concurs specially with Majority	Partly Concurring, partly Dissenting
Anderson, J.	2	....	1	2	1
Ethridge, P. J.	7	1	1	....	2
Griffith, J.	2	1	....	2	....
McGehee, J.	2	....	1	1	....
McGowen, J.	3	2	4	....	1
Smith, C. J.	3	3	1	1	1
TOTAL	19	7	8	6	5

II.

CONTRACTS AND COMMERCIAL LAW

*Vardaman S. Dunn**

A. Private Contracts

(1) Judicial Construction

Two cases were decided by the court which involved the various rules regarding the construction of written contracts. *Sumter Lumber Company, Inc. v. Skipper*[1] and *Williams v. Batson*[2] were both decided by a divided court, and almost every judge expressed his individual opinion. Both cases involved the construction to be placed upon a timber deed, and although limited space prohibits a discussion of the facts and views of the respective judges, a reference to the cases will prove to be of interest, in that the respective judges by placing emphasis on different facts and circumstances, arrived at different conclusions and each conclusion within itself is entirely logical and convincing. The cases are of little value as precedents, except for the reannouncement of general rules of construction, but they present a rare opportunity for study of the basic philosophies of the respective justices.

(2) Validity and Avoidance

The court decided six cases of special interest involving the validity of private contracts and the avoidance thereof by one of the contracting parties by reason of fraud, mistake, usury or illegality.

(a) Failure to Read

The question of whether a written contract may be avoided on the ground that one of the contracting parties failed to read and note the contents of the writing has often been before the courts. The general rule is reannounced in *Alliance Trust Company v. Armstrong*,[3] to the effect that a person who is not actually misled as to the contents of a written contract and who has the capacity and opportunity to read it, can not avoid the contract because of mistake on the sole ground that he signed it without reading it. There are of course exceptions to the general rule which occur where the parties to the contract bear some confidential relationship or there appear some other special circumstances to excuse the party's failure to read the contract.

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*Member Mississippi and Hinds County Bars; Jackson, Miss.
[1]183 Miss. 595, 184 So. 296 (1938).
[2]187 So. 236 (Miss. 1939).
[3]186 So. 633 (Miss. 1939).

(b) Illegal Consideration.

It is generally stated that the courts will not aid a party to an illegal contract. It would be impossible to state in this limited space the various ramifications of this rule and the exceptions which have been engrafted thereon by the courts. The law on the subject is fully developed in this state, and we refer to two recent cases applying the established rule.

It is established in *Charles Weaver & Company v. Phares,*[4] that the court will enforce in letter and spirit the public policy as reflected by national recovery legislation. In this case appellee sued to recover certain items of labor expenditures under a sub-contract relating to work on a Federal Aid Project. The court denied recovery for a part of the expenditures on the ground that the expenditures represented labor charges where the laboreres were worked overtime contrary to the public policy regarding such work.

There was no illegality in the consideration of this contract and accordingly the court upheld the contract involved for certain items of labor not shown to have been worked over time contrary to public policy, since the illegal were separable from the legal items of the contract.[5]

The rule that legal portions of a contract will be enforced when separable from the illegal portions was applied in the case of *Wright v. Mary Galloway Home for Aged Women.*[6] In this case the deceased, in return for accommodations, contracted with the Home for Aged Women that she would devise all real and personal property owned by her at her death to the Home, or failing in this that the Home should be entitled to a certain sum per week and that this sum should be a just claim against her estate. The deceased died intestate and the Home probated a claim for the agreed weekly compensation. A contest was made on the theory that the contract was void under Mortmain Statute, but the court held that the invalidity of the agreement to make a will did not affect the promise of the deceased to compensate the Home on a weekly basis and that the agreement for compensation created a debt enforceable against the estate.

(c) Fraud and Waiver.

The renewal of a contract indebtedness procured at the outset by fraudulent representations may serve to waive the fraud. In

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[4]188 So. 12 (Miss. 1939).
[5]See opinion on sugg. of err., 188 So. 570 (Miss. 1939).
[6]187 So. 752 (Miss. 1939).

McArthur v. Fillingame[7] it was held that the right of relief on the ground of fraudulent representations inducing a contract was waived by renewal of the contract with full knowledge of the falsity of the representations. By the renewal the original contract is superseded and the new contract becomes the subsisting obligation of the parties. The rule was further announced in this case that relief must be grounded upon representations of presently existing facts as facts and can not consist of promises except in some cases where a contractual promise is made with the undisclosed intention of not performing it, but the mere fact that a promise was broken is not in itself sufficient proof of such undisclosed intention.

(d) Attorneys Fees.

The opinion in *Riley v. Hardy*[8] is of special interest to attorneys. The case involved an allowance of attorney's fees on dissolution of a temporary injunction. The contract involved was to the effect that the defendant's attorneys were to receive nothing for their services unless the Chancellor allowed a fee as damages. The court held that under such circumstances, the court could not allow an attorney's fee. The reason given was that an assessment of such fees must rest upon equitable ground and could not exceed the damages actually sustained. Said the court: "In no event can a defendant recover more than he has paid or has become bound to pay." The same rule was applied in the cited case of *Nixon v. City of Biloxi*,[9] wherein it appeared that the attorneys representing the defendant were on an annual salary.

A number of interesting questions arise out of the decision in *Riley v. Hardy*. For instance, upon whom rests the burden of developing the proof as to the nature of the contract between the attorney and the client? If there is no proof as to the contract, would the assessment of a reasonable fee by the court be permissible?

(e) Usury.

The majority opinion in *Dickey v. Bank of Clarksdale*,[10] dealt a heavy blow to those banking institutions imposing "service charge" upon small loans. In this case, the facts disclosed that the defendant was indebted to the bank in the sum of $1,300.00. To evidence the debt, one note was executed for $1,150.00 due in one year at 8% interest, and six notes for $25.00 each to cover the balance were executed. The small notes were due in a series of from one to six months from date and a service charge of $1.00

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[7]186 So. 828 (Miss. 1939).
[8]189 So. 514 (Miss. 1939).
[9]76 Miss. 810, 25 So. 664 (1899).
[10]183 Miss. 748, 184 So. 314 (1938).

was collectible on each at maturity. It was held that the entire transaction was tainted with usury and all interest was forfeit. Since the transaction was one entire contract and each note rested upon the identical previous consideration, the larger note was tainted along with the six smaller notes by the service charge. This was held to be true, although the larger note, if viewed separately, would have been legal.[11]

The universal custom of banks to impose and collect a "service charge" can not be engrafted as an exception to the usury statute. The court declined to close its eyes to the usury because of the maxim *de minimis non curat lex,* with the observation that if these charges were so trifling that the court should close its eyes to them, then the banks should not insist upon the charge. Three judges dissented in whole or in part.

B. Public Contracts

The law of public contracts especially commands our attention because of the great increase in public work during the past few years. Several important and interesting cases dealing with highways, municipalities and counties were decided by the court.

(1) Highways

The case of *Wunderlich v. State Highway Commission,*[12] was a decided setback to the Highway Department and is probably the forerunner of a great deal of litigation. In brief the court held that the Highway Commission was subject to suit by a road contractor for damages growing from a breach of contract and that the liability of the Commission in such cases was identical to that of a private individual under similar circumstances. The alleged breach of contract consisted in the failure of the Commission to furnish the contractor with the necessary right of way within a reasonable time. There was also involved the question of accord and satisfaction based upon the contractor's receipt and endorsement of his final estimate check. But the Commission made the apparent mistake of setting forth the items of work for which the check was given to cover, and the itemized statement did not include damages for delay in furnishing the right of way. The court held that the endorsement on the check operated as a release only with respect to the specified items. Justice Ethridge in a dissenting opinion took the view that the Commission was not subject to suit for damages on breach of contract.

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[11]Wright v. Mary Galloway Home for Aged Women, 187 So. 752 (Miss. 1939); and Charles Weaver & Co., Phares, 188 So. 12, 570 (Miss. 1939).

[12]183 Miss. 428, 184 So. 456 (1938).

Although the statute giving the Highway Commission the right to sue and be sued[13] is broad in its terminology, its application has been restricted by the court to very narrow limits. For example, as in other cases where the state is a party, no suit can be maintained for a tort committed by an agent of the commission. But, as observed by the court, to apply a like rule to suits for breach of contract would seriously handicap the state in the market for the services and materials necessary for public works. Accordingly, as a matter of policy, the statute is construed so as to include an action for breach of contract within the authority granted the Commission to sue and be sued.

It is likewise established that the Highway Commission is responsible for misrepresentations of fact by one of its agents to the extent that a contract based thereon may be rescinded. In *State Highway Commission v. Powell*[14] an agent of the Highway Commission negotiated with a land owner for part of a right of way. The owner agreed to sell the land only after the agent assured him that the Commission "had already planned to provide an underpass" through which the owner's stock might pass. A consideration in money was paid and a deed executed on the faith of this assurance. The court held that the owner was entitled to rescind the sale and cancel the conveyance on the theory that the Highway Commission, through its agent had misrepresented an existing fact. The Commission argued that since no express authority was given its agent by entry on its minutes, the Commission was not bound by the acts of its agent.

The court recognized the general rule that a public body can be bound only as reflected by its minutes, but pointed out that the plaintiff in this suit did not seek to enforce an agreement, nor did he seek additional compensation for the Commission's failure to provide the underpass. The suit was for the rescission of a contract which was void as a result of fraud in its inducement. It was held that the Commission could not deny responsibility for the fraud and at the same time retain the fruits thereof. On the other hand had the representation of the agent been merely a promise that the Commission would do something in the future, it could not have been enforced in the absence of express authority evidenced by the minutes of the Commission. As to false representations of existing facts, however, the Commission was subject to the same rules as a private individual.[15]

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[13]Miss. Code Ann. (1930) § 5006.

[14]185 So. 589 (Miss. 1939).

[15]*Cf.* Pearl Realty Co. v. State Highway Comm., 110 Miss. 103, 154 So. 292 (1934); State Highway Comm. v. Duckworth, 178 Miss. 35, 172 So. 148 (1937).

The case of *Day v. Royce Kershaw*[16] is of immediate interest to those who may have a materialman's claim against a highway contractor and his surety. The standard highway construction surety bond provides for the payment of "all of the expense and cost and attorneys' fees that may be incurred" in enforcing the contract or conditions of the bond. The bond enures to the benefit of laborers and materialmen, but our statutes prevent any suit by such parties within six months from publication of final settlement under the construction contract. The court held that a materialman who employed attorneys to coerce or induce the publication of final settlement was entitled to damages by way of attorney's fees without regard to whether suit was filed on the claim and further that a tender by the contractor or surety of the amount due before the expiration of the six months period could not prevent collection of attorneys' fees.

(2) Counties

The validity of a contract made with an individual member of the Board of Supervisors in vacation of the board was considered in *Simpson County v. Panther Oil and Gas Company.*[17] The case involved a suit by the oil company against the county to recover the purchase price of the goods used by the county on its roads. It appeared that the goods were purchased by a member of the Board of Supervisors in vacation of the Board and without any authority appearing on its minutes. The court held that such contract would be binding on the county only in case of an emergency within the statutes on the subject.[18] Since there was no emergency shown in the case at bar, the oil company was denied recovery for the purchase price of the goods involved, although they were actually used on county roads.[19]

(3) Municipalities.

Every building contractor should be advised of the opinion in *City of Hattiesburg v. Cobb Bros. Constructing Company.*[20] This was a suit by the contractor to recover a guaranty deposit furnished by him with his bid for municipal construction work. A recovery was sought on the ground that an honest mistake had been made in calculating the bid and that the City had been notified of the mistake in writing prior to awarding the contract to the plaintff as low

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[16]187 So. 221 (Miss. 1939).
[17]188 So. 566 (Miss. 1939).
[18]Miss. Code Ann. (1930) § 6365.
[19]It is noted that the suit was to recover the purchase price of the goods and not the reasonable value thereof. *Cf.* cases treated under the heading, "municipalities".
[20]183 Miss. 482, 184 So. 630 (1938).

bidder. But it appeared that the notice did not state the character of the alleged mistake and simply recited that the bidder had "made a mistake" in his bid. The court recognized the rule that the guaranty deposit is recoverable where an honest mistake is made in the calculation of the bid provided the proper notice is given before the bid is acted upon, but held that the notice in this case was insufficient in that there was no explanation of the mistake which would have reasonably enabled the public authorities to ascertain whether a mistake was in fact made, and if made, whether honestly made. In the absences of these requirements, the public authorities are without the right to permit a withdrawal of the bid. It is indicated that a more strict rule is to be applied in connection with public contracts as distinguished from private.

An interesting feature of the case was the application of the three-year statute of limitations[21] to the assertion of the plaintiff that in addition to the written notice, the city was orally advised of the nature of the alleged mistake. The court held that the statute applied to the oral notice so as to preclude any proof thereof, either to establish the plaintiff's case or as an aid to the written notice relied upon.

The case of *American-LaFrance, Inc. v. City of Philadelphia*[22] involved a suit wherein the plaintiff sought to recover possession of a fire truck which had been delivered to the city under a contract of purchase. The plaintiff also sought reasonable compensation for the City's use of the truck. The contract was found to be void as a result of certain technical omissions from the minutes of the Municipal Board, but the written sales contract had been signed by the Mayor and part of the purchase price had been paid. The court found as a matter of fact and as a condition precedent to recovery, that there was no corruption, unfairness or secrecy involved in the transaction and that the alleged sale of this type of property was within the objects authorized by law. Under such circumstances and only on the specified conditions, the seller is entitled to recover from the city, not only the specific property but also reasonable compensation for its use.[23] Under no circumstances can the seller recover the purchase price in an abortive contract either as stipulated for therein or upon a *quantum valebant*.[24]

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[21]MISS. CODE ANN. (1930) § 2299. See City of Hattiesburg v. Cobb Construction Co., 174 Miss. 20, 163 So. 676 (1935).

[22]183 Miss. 207, 184 So. 620 (1938).

[23]*Cf.* Amite County v. Mills, 138 Miss. 222, 106 So. 465 (1925); Smith County v. Mangum, 127 Miss. 192, 89 So. 913 (1921).

[24]*Cf.* Simpson County v. Panther Oil and Grease Co., 188 So. 566 (Miss. 1939).

The court has adopted a middle ground. On the other hand are found cases from other jurisdictions allowing recovery for the reasonable value of the article and others denying recovery except to the extent of allowing repossession of specific property. Our court allows not only a repossession of the specific property, but also a reasonable compensation for its use under certain conditions of good faith and fairness in the execution of the contract, coupled with the requirement that the property involved be within the objects authorized by law.

In the test case of *Davenport v. Blackmur*,[25] the established rule was reannounced to the effect that municipalities have only such powers as are expressly granted by statute, and such powers as are necessary and appropriate to the exercise of those statutory powers. Applying this rule, the court held that a city did not have authority to enter into a contract for the purchase of equipment to establish automobile testing stations, since this amounted to using public funds to engage in private business.[26]

C. Sales

(a) Offer and Acceptance.

In *Mattingly v. G. B. R. Smith Milling Company*,[27] it was held that the purchaser of flour could not recover back from his vendor the amount attributable to the Federal processing tax after that tax had been declared to be unconstitutional by the United States Supreme Court. The rule is that a quoted price for delivery of merchandise includes or excludes, as the case may be, all taxes on the articles unless some reservation is expressly made by the parties in their contract. The vendor must deliver the merchandise for the agreed price, and on the other hand, when the vendee accepts the merchandise he can not go behind the agreement and separate items of cost or expense which are indistinguishably incorporated into the quoted price.

(b) Performance.

In *McFadden and Oates v. Ray*,[28] the rule was announced that where a contract is to be performed to the satisfaction of the party for whose benefit services are rendered or to whom goods are delivered an objection to or disapproval of the manner of performance must rest on some reasonable and just basis unless the

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[25]186 So. 321 (Miss. 1939).

[26]*Cf.* Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938). Albritton v. City of Winona, 303 U. S. 627 (1938) involving the "Balance Agriculture with Industry" program.

[27]183 Miss. 505, 184 So. 635 (1938).

[28]185 So. 245 (Miss. 1939).

transaction involves a matter of peculiar fancy, taste or sensibility. The law does not permit an arbitrary disapproval of the manner of performance as an excuse for a refusal to make compensation for the services rendered or goods delivered.

(c) Indicia of Ownership.

The court, without discussing the authorities, made an interesting application of the indicia of ownership doctrine in the case of *Morris v. Smith*.[29] The plaintiff entered into a contract with one Daughdrill for the sale of certain building blocks for which the purchaser was to pay a certain sum in money and execute notes for the balance of the agreed price. Pursuant to this agreement, the blocks were delivered and deposited on the land owned by the purchaser and the contract between the parties was duly recorded. The purchaser failed and refused to pay any part of the purchase price or execute the notes for same. No action was taken by the plaintiff to recover possession of the blocks and they remained on the purchaser's land for more than three years. During this three year period the purchaser died and the land, together with the personal property, was sold by the heirs and came into the hands of the defendant in this case. The court held that because of the long inaction of the plaintiff, coupled with the indicia of ownership created by recording the contract and permitting the personal property to remain on the land of the purchaser, the plaintiff was estopped as against a subsequent innocent purchaser to assert his title to the property. The court announced the rule that an unreasonable delay of a seller in asserting his title because of the buyer's default would constitute a waiver of the seller's right to reclaim the property under a materialman's or purchase money lien. If the contract of sale had stipulated that cash was to be paid promptly on delivery of the property, then the seller must immediately act if he desired to retain title to the goods. On the other hand, a reasonable time will be allowed where notes are to be executed. The contract was not a conditional sales contract but it was recorded with the apparent intent of reserving a materialman's lien or purchase money lien on the property.

(d) Conditional Sales.

Deciding for the first time the precise question involved, the court in *Commercial Credit Company v. Spence*[30] affirmed a judgment for punitive damage and denounced as an aggravated and oppressive trespass the act of appellant in breaking into and taking an automobile under the repossession clause of a condi-

[29]185 So. 548 (Miss. 1939).
[30]184 So. 439 (Miss. 1939).

tional sales contract. The trespass was committed in the absence of the vendee or other person having custody of the automibile, by breaking into one of the windows in order to gain access to the inside of the car. The court held that the conditional sales contract was mere security for the purchase price of the automobile and that while sufficient to maintain replevin or peaceable repossession, the contract could not justify the use of force. It was further held that regardless of the terms of the instrument, public policy in the interest of peace and good order prohibited the use of force and violence which might be provocative of retaliatory violence and breach of the peace. The final installment on the contract in this case was past due at the time of the trespass, but there was evidence to the effect that vendee had not paid the balance due because the vendor had not offered to return the purchase money note for cancellation. This fact was observed by the court but the opinion indcates that the same conclusion would have been reached even though the vendee had been in wilful default.

(e) Warranty.

Two cases were decided dealing with foreign substances in food and bottled drinks. Cases involving physical injury from the presence of harmful foreign substances in food and bottled drinks invariably involve the problem of whether the action should be founded on the theory of tort or breach of implied warranty. A comparison of the two recent cases on the subject, one sounding in tort and the other in implied warranty, indicates that the theory adopted is immaterial in ordinary cases against the manufacturer. Under either theory the consumer makes a jury issue showing that the foreign substance was present when the bottle was opened as against the contention of the manufacturer that it was impossible for the substance to have been in the bottle on leaving its plant.

In tort cases the doctrine of *res ipsa loquitur* applies and the consumer is not required to produce a witness to say that the manufacturing plant is negligently operated.[31] The plaintiff is entitled to the same inference in actions for breach of implied warranty.[32] The measure of damages is the same under each theory; so as against the manufacturer the theory of the act is of little concern unless some special circumstance is present, such as the fact that the sale to the consumer was made on Sunday, which renders the contract void and excludes the theory of implied warranty.[33]

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[31]Blount v. Houston Coca Cola Bottling Co., 185 So. 241 (Miss. 1939).
[32]Biedenharn Candy Co. v. Moore, 186 So. 628 (Miss. 1939).
[33]See Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925).

Of course, where a recovery is sought against the retail merchant, very different considerations enter into the case. The mere fact that a foreign substance is present when the bottle is uncapped or consumed, gives rise to no inference of negligence on the part of the retail merchant.[34]

In *J. C. Penny Company, Inc. v. Scarborough*[35] it was held that the plaintiff failed to prove the element *scienter* in a damage suit based upon the theory of express warranty. A clerk told the plaintiff, while trying to sell him a pair of socks, that a certain chalky substance appearing on the socks was not harmful, however, the substance injured plaintiff's feet because of some chemical content. The court pointed out that the clerk was not shown to have had technical knowledge as a chemist or other technician and that his commendation of the merchandise was made in the light of his experience as a clerk only and the only reasonable inference from his statement as to the chalky substance was that he was using "dealers' talk". The clerk did not know and was not required to know the chemical content of the chalky substance on the socks, and the purchaser should have known this and accordingly his remarks upon the statement was insufficient to hold the clerks' master. The case is a very close one and the distinction is fine.

The case of *Magee Laundry and Cleaners v. Harwell Appliance Company*[36] involved the question of implied warranty in the sale of an air conditioning unit. When the unit was installed the vendor's expert agent assured the purchaser that the unit would air condition the purchaser's office. After execution of the purchase money note, it was found that the unit was too small to serve the purpose for which it had been purchased. The purchaser had no knowledge of the size of a unit required for the purpose intended and relied solely on the representations of the vendor's expert. The court defined the term "air conditioning" to mean that the building would be rendered reasonably comfortable to the extent usually experienced in air conditioned buildings.

There was no latent defect in the appliance and for this reason the lower court denied recovery. In reversing this holding the supreme court held that as to modern conveniences and appliances the public must in many instances rely on the expert knowledge and assurance of the vendor as to suitability for the purposes intended so that representations of fitness when relied on should be made good, even though the vendee inspected the

[34]See Blount v. Houston Coca Cola Bottling Co., 185 So. 241 (Miss. 1939).
[35]186 So. 316 (Miss. 1939).
[36]185 So. 571 (Miss. 1939).

property and no latent defect was involved. In *Anderson v. First Securities Company*[37] the court held that the vendee could not set up breach of warranty against the vendor in defense of an action on renewal notes executed to the vendor for the purchase price of defective merchandise, where the vendee knew "or by the exercise of ordinary care should have known" of the defect prior to executing the renewal notes.[38]

Misrepresentation by an automobile salesman as to the mileage of a second-hand car amounts to actionable fraud. It was held in *Laurel Auto Supply Company v. Sumrall*[39] that such misrepresentation rendered the contract of sale absolutely void and the vendee might elect to rescind the contract, return the car and recover any consideration passing to the vendor or he might retain the property and recover the difference in actual value and the agreed purchase price. Moreover, the defense that the purchase money note had been negotiated to a third party is not available to the vendor in an action to recover the difference in value. The court indicates, however, that the rule might be different where the vendee is insolvent.

D. Liens

A vendor's lien may be waived or the party claiming it may be estopped to assert the lien. In *Mechanics State Bank v. Kramer Service,*[40] it was held that a vendor waives his lien when he carves out his own security provided that security is inconsistent with the retention of a vendor's lien and this is especially so where a third party has acted upon the faith of the waiver.

The case of *Billups v. Beckers Welding and Machine Company*[41] involved the rights of one asserting a mechanic's lien against personal property. On the question of priority of the lien over a deed of trust the court held that, as to items furnished prior to the deed of trust, the burden rested upon the mortgagee to show absence of actual knowledge of the lien since the statute[42] actually created the lien without affirmative action of the parties and the presumption was that the owner advised the mortgagee of the lien when the deed of trust was executed, because his failure in this regard would have amounted to an illegal act.

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[37]188 So. 548 (Miss. 1939).
[38]*Cf.* authorities cited in the opinion.
[39]185 So. 566 (Miss. 1939).
[40]186 So. 644 (Miss. 1939).
[41]189 So. 526 (Miss. 1939).
[42]Miss. Code Ann. (1930) § 2255.

In *City Coal and Lumber Company v. Gulf Refining Company*[43] the appellant sought to impose liability on the owner of certain buildings under the so-called "stop notice" statute.[44] The contractor constructed the buildings under the lump sum contract with the owner and appellant advanced money to the contractor which was used in paying laborers. The money was advanced directly to the contractor by checks payable to his own account. The court held that this did not constitute furnishing labor on the job so as to bring appellant within that class of persons entitled to a mechanic's lien or rights under the "stop notice" statute. It was pointed out by the court that appellant was not a party to the building contract and, therefore, neither the owner nor the contractor were appellant's agents for procuring and paying laborers.[45]

E. Chattel Mortgages

In the case of *Sanson v. Martin*,[46] deals with the remedies of foreclosure and the recovery of deficiency judgments. In brief and positive language the court announced the rule that the two remedies are not inconsistent and the mortgagee may foreclose in whole or in part and sue for any deficiency, or he may decline to foreclose to any extent and recover judgment for the mortgage indebtedness. The absence of foreclosure is no defense to an action for the debt.

F. Bailments

In *Edwards Hotel Company v. Terry*[47] the rule was announced that the *prima facie* case made by proof of delivery and failure to return the bailed property disappears on proof of loss by theft, and the bailee must prevail unless the bailor goes forward and proves that the theft was due to the bailee's negligence. By way of comment, however, it is observed that no affirmative misdelivery was involved in this case either to a servant of the bailee or a third person. In the case of misdelivery the authorities are confusing as to whether the bailee acts at his peril or is obliged only to exercise due care.

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[43]185 So. 250 (Miss. 1939).
[44]Miss. Code Ann. (1930) § 2274.
[45]It is to be noted that the law on this subject is in an undesirable state of confusion. *Cf.* Planters Lumber Co. v. Plumbing Wholesale Co., 181 So. 140 (Miss. 1938); White's Lumber and Supply Co. v. Rea, 158 Miss. 695, 131 So 259 (1930).
[46]185 So. 576 (Miss. 1939).
[47]187 So. 518 (Miss. 1939).

G. Agency

In *Dixie Greyhound Lines v. Everett*[48] the rule was announced that a railroad conductor has no authority to bind his company by a special agreement as to the destination of a passenger, and therefore the company would not be liable in an action for breach of contract predicated upon such special agreement. A special agreement as to destination must ordinarily be made with the ticket agent. By analogy this rule was applied to motor bus drivers. Although the point was not discussed, it did not appear in this case that any consideration passed for the alleged special agreement. The court indicated that the company might be estopped to deny the authority of its drivers in this connection, where it appeared that the special agreement conformed to the uniform practice or custom over a long period of time.

H. Corporations

In *C. I. T. Corporation v. Stewart*[49] the question arose as to whether or not a foreign corporation could sue in this state where it had not been qualified to do business by observing the necessary statutory requirements. The court held that where, as in this case, a foreign corporation merely sends agents into the state to solicit reserve title contracts but actually purchases the contracts in another state, this does not amount to "doing business" within this state as contemplated by the statutes.[50]

The case of *Home Owners Loan Corporation v. Moore*[51] reviews the well established general rules regarding acts of Corporations alleged to be *ultra vires*. The law looks with disfavor on the defense of *ultra vires* and will not allow it to prevail when it would defeat the ends of justice. The doctrine should never be applied if such a result can be avoided. An act of a corporation relating to subjects within its powers, though it should exceed those powers, is not void and such act will not be declared void unless it be entirely foreign to the purposes for which the corporation was created, and unless the act is absolutely void, the question of *ultra vires* can only be raised by the sovereignty which created the corporation.

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[48]187 So. 509 (Miss. 1939).
[49]187 So. 204 (Miss. 1939).
[50]*Cf.* Marx and Bensdorf Inc. v. Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297 (1937) and cases cited therein.
[51]185 So. 253 (Miss. 1939).

III.

CRIMINAL LAW

*W. D. Conn**

During the September, 1938, and March, 1939, terms of the Supreme Court there were comparatively few cases which made any "new" law. A few cases, however, are of special importance and should be particularly noted by the bar generally, both from the standpoint of the prosecution and the defense. They are, as I see them, the most important criminal decisions of our court during the terms mentioned.

A. Homicide

(1) Resisting Unlawful Arrest:

Walker v. State,[1] involved a conviction of murder wherein the death penalty had been assessed. The evidence showed that one Honeycutt, a private citizen, had discovered appellant early one morning eating a watermelon and asked him where he got it. Appellant pointed to Honeycutt's melon patch and told him he had taken the melon out of it. Thereupon, Honeycutt arrested appellant with a view of taking him to lawful officers of the county. Shortly thereafter appellant killed Honeycutt in making an escape from his custody. In the Supreme Court the one big question was whether Honeycutt was in possession of sufficient information to know that appellant was committing a misdemeanor within the rule that a misdemeanor must be committed in the presence of the arresting individual to justify an arrest without a warrant. The court in reversing the conviction, said:

> "All that Honeycutt (deceased) observed was a watermelon in the possession of appellant. He had no knowledge whatever that it had been stolen from him except through the confession of appellant."

Since the deceased did not see the original trespass and taking, the court said that the misdemeanor did not occur in the presence of Honeycutt, and, therefore, the arrest was unlawful, and held that on the particular facts of the case, manslaughter was the highest crime of which the appellant could be convicted.

(2) Indictments

In *Roland v. State*,[2] the indictment was for an assault and battery with intent to kill and murder "Emmett Merchant". It did not describe the assaulted person as a "human being". The

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[1]189 So. 804 (Miss. 1939).

[2]182 Miss. 794, 183 So. 527 (1938).

statute defining the offense limits its operation to assaults on "human beings". There was no demurrer to this indictment but after conviction it was argued that the indictment charged no offense because of the stated omission. The court said that this was a formal defect which should have been availed of by demurrer prior to the impaneling of the jury as required by statute and could not be raised in the Supreme Court for the first time. The court referred to cases in other jurisdictions which hold that such an omission is not even a defect and would not render the indictment or affidavit demurrable in any event.

(3) Culpable Negligence

During the last few years a good many convictions have been upheld by the court where such convictions were for manslaughter resulting from culpable negligence in the operation of automobiles. In *Scott v. State,*[3] the court reversed such a conviction where the evidence showed that the driver, operating his automobile somewhat faster than usual, lost control of it while attempting to make a left turn at the intersection of certain streets in Greenville and, in order to avoid collision with another automobile, ran on a sidewalk, struck and killed a pedestrian on the sidewalk. The court said that the driver was guilty of simple negligence only, and, therefore, his conviction of manslaughter could not be upheld.[4]

(4) Instructions on Self Defense

Durng the last year several case have been before the court which involved instructions limiting the right of self-defense to the actual time of the shooting. For instance, in *Vance v. State,*[5] the court said that an instruction which limited the right to "the very time the fatal shot was fired . . . . . circumscribed the right of self defense within too narow limits and has been in principle heretofore disapproved by this court." This case, it will be noted, however, was not reversed for the giving of this instruction, but was reversed because another instruction estopped the accused to plead self-defense,—the court holding that the elements required for the giving of this instruction were not present in the case. About the same time the *Vance* case was decided, *Woods v. State*[6] was pending before the court and an instruction in that case similar to the one in the *Vance* case was not referred to, either in the argument or in the decision. Thereafter, on suggestion of

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[3]183 Miss. 788, 185 So. 195 (1938).
[4]Miss. Code Ann. (1930) § 1002.
[5]182 Miss. 840, 183 So. 280 (1938).
[6]185 So. 508 (Miss. 1938).

error[7] the court referred to the *Vance* case, and called attention to the fact that that case had not been reversed because of the giving of this particular instruction, and further stated that it would depend upon the facts of each particular case as to whether the giving of an instruction containing the provision above referred to would or would not be reversible. The court overruled this suggestion of error and in so doing held that the giving of this instruction in the *Woods* case did not constitute reversible error.

A short time later the case of *Irby v. State*[8] was before the court and in this case the wording of the instruction limited the right of self-defense to "the very time of the fatal blow". Again, the court said that these words limited too severely the right of the defendant to act on appearances. Again in *Ross v. State*,[9] the court said that an instruction which limited the accused to "the very instant the shot was fired" constituted prejudicial error on the particular facts of that case.

B. Searches and Seizures

In *Lynchard v. State*,[10] the sheriff of Humphreys County made an affidavit charging Lynchard with disturbing "the peace in the City of Belzoni, Mississipi." Upon execution of a warrant issued on such affidavit the sheriff arrested Lynchard and found him with a contraption under his coat in which he was carrying bottles of whiskey. He was subsequently tried for unlawful possession of intoxicating liquor and, at his trial, objected to the testimony of the sheriff on the ground that he was unlawfully under arrest at the time the sheriff found the whiskey on him. The court discussed at some length the matter of how far an officer is required to go in determining the legal sufficiency of a charge for which he undertakes to arrest another person. Said the court:

> "Where some offense known to the law has been committed, or is said to have been committed and the affidavit is merely insufficient to charge such offense against the accused, the officer may lawfully execute a warrant for his arrest without being required to inquire into the sufficiency of such affidavit . . . . We must assume that the sheriff, as chief law enforcing officer of the county, knew that a general charge of having disturbed the peace in the City of Belzoni is not punishable as a

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[7]183 Miss. 135, 184 So. 311 (1938).
[8]185 So. 812 (Miss. 1939).
[9]188 So. 295 (Miss. 1939).
[10]183 Miss. 691, 184 So. 805 (1938).

> crime. If a person may be thus accused in general terms and taken into custody with authority to search his person by the officer making the charge, then the constitutional guarantee against such unlawful searches would be rendered impotent as a safeguard to the rights and liberties of a citizen."

The conviction in this case was reversed and the accused was discharged from custody.

In *McGowan v. State*,[11] the court further elaborated upon the matter of what it takes to constitute probable cause for the search of an automobile without a search warrant. The court said:

> "The law requires that the information upon which the sheriff or other officer acts, when not his personal information, must be given by a credible person and the facts must be shown to be within the knowledge of the informant (Cf. Elardo v. State, 169 Miss. 628, 145 So. 615). The search and seizure of persons or property can only be authorized by strict compliance with the law; the law requires that information be obtained from a credible person,—credible in the legal sense as being a person whose known standing or reputation in the community for veracity and reliability entitle him to belief by a reasonably prudent person. It is not sufficient merely to show that the sheriff or other officer actually believed the information to be true; in addition, such officer must have received it from a person whose reputation for truthfulness warrants that belief. An officer, in certain respects, may be easy to convince. The test is whether or not it was sufficient to convince an ordinarily reasonable man. When the credibility of a witness is spoken of, it refers not only to his capacity to testify, but also to whether it is worthy of belief,—a man whose standing is such that ordinarily his word would be accepted."

In this case the court said the negro informant had been before the courts a number of times on charges of violating the liquor laws; that the officers did not inquire further respecting the source of their information to the effect that the defendant would be transporting intoxicating liquor along a certain highway at an approximate time; held that this information did not come from a credible source and reversed the conviction.

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[11]185 So. 826 (Miss. 1939).

In *Quan v. State*,[12] officers searched the premises of Quan, looking for stolen goods. The search warrant was void. During the time the officers were making this unlawful search, Quan made certain admissions to the officers which implicated him in the offense of receiving stolen goods. The trial court ruled out all evidence relating to what was found at the time of this unlawful search. The statements and admissions of Quan, however, were admitted in evidence over his objections. It was argued that appellant's admissions, under such circumstances, were not admissible in evidence, but that everything seen and heard by the officers while unlawfully on the premises was incompetent. The court held that such admissions or confessions made at such time and place, and under such circumstances, were admissible, if it were shown that they were made freely and voluntarily for the reason that under such circumstances a man may remain silent if he so chooses. Said the court:

> "And if it be said that the mere fact that an illegal search is being made, regardless of the manner of the conduct thereof, puts the accused under an unlawful restraint, or under a sort of illegal pressure, or surrounds him with an unlawful oppression, wherefore as a matter of legal policy any statements made by the accused should be excluded, we would have no greater reason in point of legal policy for such exclusion than in cases of such statements or confessions when made while the accused is in custody under an illegal arrest; and nearly all of the authorities are in agreement, so far as we have found, that confessions freely and voluntarily made while in custody under an unlawful arrest, are not excluded on account of the illegality of the arrest. As illustrative of the cases so holding, we may cite Gilmore v. State, 3 Okl. Cr. 434, 106 P. 801, 27 L. R. A. (NS) 151, and the notes thereunder.
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> "We conclude, therefore, that the admissions were properly received in evidence, and there being no reversible error in the record as to the other matters complained of, the judgement must be affirmed."

C. Statutes of Limitation

McCullar v. State,[13] reaffirms the rule that where a defendant enters a plea of not guilty to an indictment, it is incumbent upon the state to show that the prosecution is not barred by any statute of limitations, since by such plea the accused puts everything in issue.

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[12]188 So. 568 (Miss. 1939).
[13]183 So. 487 (Miss. 1938).

D. Appeals From County Courts

In *Drummond v. State*[14] appellant had been indicted for a felony in the Circuit Court of Newton County. The indictment was transferred by that court to the county court for trial. Upon conviction in that court, he appealed directly to the Supreme Court under the provisions of Chapter 256, Mississippi Laws of 1932. Subsequently, he filed his motion in the latter court to transfer his appeal to the Circuit Court of Newton County upon the assigned reason that the 1932 law, just referred to, was unconstitutional, and relied upon a part of the decision in *Ex Parte Tucker*,[15] where the court, in discussing state constitutional provisions with reference to "inferior courts", said:

> "It is competent, therefore, to create a court which may be permitted to exercise in full measure the same jurisdiction as the Circuit Court, so long as the Circuit Court shall be superior thereto and this attribute of superiority is accomplished by giving the Circuit Court the controlling authority of reversal, revisal, correction and *direction over the new court*, as by certiorari, appeal, etc."

Upon the motion to transfer, the court went into a discussion of original and appellate jurisdiction and legislative power with reference thereto and concluded that,

> "It follows, therefore, inescapably, that since the Legislature has plenary powers over this subject of appeals, it could prescribe that an appeal from this inferior court in this class of cases, or in any other particular class of cases, might be direct to the Supreme Court. If the power of the Legislature in this regard is to be restricted or limited, then some section of the Constitution must be pointed to which so limits or restricts the power. As already mentioned, no such section of the Constitution must be pointed to which so limits or restricts the power. As already mentioned, no such section of the Constitution can be found. It is, therefore a matter solely for the Legislature to decide, and the Legislature having so decided, the court is without power to avoid this said legislation."

Section 694, Code of 1930, authorizes the Circuit Court to transfer indictments for felonies, less than capital, to the County Court for trial, and, said the court:

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[14]185 So. 207 (Miss. 1938).
[15]164 Miss. 20, 143 So. 700 (1932).

"The authority of the Circuit Court to make such transfers to the county courts is itself supervisory in nature."

The court overruled the motion, retained jurisdiction, and subsequently affirmed the conviction.[16]

E. Split Decisions

The court settled the law with reference to 3-3, or split, decisions, in *Dean v. State*,[17] holding in that case that the concurrence of four judges was necessary to reverse or set aside a judgment of the trial court. In *Smith v. State*,[18] there was a conviction of murder carrying the death penalty. Four of the six judges of the Supreme Court concurred in a reversal. Two of these four judges favored a discharge of the accused on the merits of his case, while the other two thought the case should be retried. The other two judges voted for an affirmance. Under such circumstances, the court held that the case should be remanded to the trial court for another trial.

F. Judgments by Default

In *Cogsdell v. State*,[19] accused was indicted for uttering a forgery. He conducted his own defense at the trial. The evidence, at most, was that accused had been found in possession of a check upon which an endorsement had been forged. Accused requested no instructions; neither did he move to exclude nor ask for a new trial. On appeal, after conviction and sentence, the court said, "the point is now presented whether, in the absence of such requests or motions, or any of them, this court may review the judgment."

"As aforeshadowed in Clark v. State, 100 Miss. 751, 57 So. 209, 38 L. R. A. (NS) 187, Ann. Cas. 1914A, 463, we hold that when the evidence wholly fails, when there is an entire absence of evidence, to convict the accused of the crime charged in the indictment, the point may be raised for the first time on appeal. Such a case is in the same attitude, in practical effect, as had the state simply introduced the indictment and thereupon had rested without the introduction of any evidence whatever. This would be the equivalent of taking a judgment by default on the merits, which in felony cases is fundamentally erroneous, whatever may be the guise or the attempt so to do."

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[16]187 So. 224 (Miss. 1939).
[17]173 Miss. 254, 162 So. 155 (1935).
[18]185 So. 193 (Miss. 1938).
[19]183 Miss. 826, 185 So. 206 (1938).

IV.

DOMESTIC RELATIONS

*M. B. Montgomery**

Comparatively few cases were passed on by the Supreme Court at the September Term, 1938, and the March Term, 1939, involving domestic relations. In only a small number of these cases did the decision of the court make any change in procedure, announce any new law, or advance accepted principles into new fields. However, some of these decisions occasion more than passing interest.

A. Divorce

In *Turnage v. Tyler*,[1] a divorce had been granted the wife by the Chancery Court of Lawrence County. The divorce decree made no provision for the custody of the two children of the marriage nor for their support and maintenance. Thereafter, the wife filed a petition in the Civil District Court for the Parish of Orleans, Louisiana, and obtained an award of $20.00 per month for the support and maintenance of the children. Later the award was reduced by the court with the consent of the petitioner. Finally she filed a petition in the Chancery Court of Newton County, Mississippi, where the former husband was then residing, and alleged that the children had grown older and their needs and requirements had become greater and asked the court to award her a monthly allowance commensurate with their present needs. The former husband defended on the ground that the Chancery Court of Newton County was without jurisdiction, and that the decree of the Civil District Court of Louisiana was *res adjudicata*. The court denied both contentions, adhered to the rule announced in *Schneider v. Schneider*,[2] and *Gallant v. Gallant*,[3] and upheld the award of $20.00 per month made by the lower court as being reasonable and supported by the testimony in the case.

In *Mucklerath v. Chezem*,[4] suit for divorce was filed and an application then made to the Circuit Judge for a writ of *ne exeat republica*. An order was entered directing the clerk to issue the writ against the husband prohibiting him from leaving the state and directing the sheriff to require a bond in the sum of $750.00. The writ was issued and the bond given with Mucklerath and Alexander as sureties. On the hearing a divorce was

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*Chancellor, 11th Chancery District; Yazoo City, Miss.

[1]183 Miss. 318, 184 So. 52 (1938).
[2]155 Miss. 621, 125 So. 91 (1929).
[3]154 Miss. 832, 123 So. 883 (1929).
[4]186 So. 621 (Miss. 1939).

granted Mrs. Chezem, and she was granted the custody of the five children. The lower court also allowed $40.00 per month as alimony to the wife and $40.00 per month for the support of the minor children. The lower court also included in its decree a judgement against the sureties for $750.00, payable as and when due for alimony and support under the terms of the decree. On appeal the court recalled that procedures and orders in *ne exeat* had never before been under review in this state, but held that the proper procedure, as established by the High Court of Chancery of England, is to take a forfeiture on the bond, treat the principal and sureties on the *ne exeat* bond as having entered their appearance in the suit for the purpose of jurisdiction, and enter a decree directing them to pay the penalty of the bond into court or within some reasonable time to appear and show cause, if any they can, why a money decree should not be rendered against them.

In *Lamar v. Houston*,[5] a wife had sued her husband for divorce alleging that their separation occurred in Quitman County and that complainant in said suit was a resident thereof and five days personal service of process was had on the defendant before the first day of the term at which the court granted a divorce, adjudicating in effect that the court had jurisdiction of both the subject matter and the parties. Later the wife, after more than one year and three months, remarried and shortly thereafter the divorced husband brought suit to cancel the divorce decree on the grounds of fraud, alleging that the separation did not occur in Quitman County but in Webster County. The court, while recognizing the rule that ordinarily a judgment or decree may be impeached for fraud either on direct or collateral attack, nevertheless, held that a person may be denied relief on account of laches and that the defendant's act in neglecting to take any action until after his wife remarried, though he had full knowledge of the alleged fraud, constituted grounds for the defense of laches, and the court, consequently, denied all relief against the divorce decree.

B. Guardian and Ward

In *First National Bank v. Landau*,[6] the court held that Section 2295, Code of 1930, providing that, "An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, but within four years after the qualifications of such

[5]183 Miss. 260, 184 So. 293 (1938).
[6]183 Miss. 651, 184 So. 618 (1938).

executor or administrator" is remedial in its nature and must be liberally construed; that it is *in pari materia* with Section 1902, Code of 1930 providing that "The guardian of a person of unsound mind, convict of felony, habitual drunkard, habitual user of cocaine, or morphine or opium, shall make a true and perfect inventory of the estate and return the same and account with the court as often and in the same manner as executors and administrators; and in the same manner shall give bond with sureties, and take the oath to discharge the duties; and the court shall have the same power and control over such guardians as it has over executors and administrators; and the guardian shall also be liable, on his bond, in the same way, and the court shall have the same power over the estates of such wards as it has over the estates of decedents, and all the provisions of law on the subject of executors and administrators, relating to inventories, appraisements, settlements or disposition of property, notice to creditors, registration of claims, accounts, proceedings to insolvency and distribution of assets of insolvent estates, shall, as far as applicable, and not otherwise provided, be observed and enforced in all such guardianships . . . . ", and the two statutes must be construed together. The court, therefore, concluded that Section 2295, Code of 1930 applies to guardians as well as executors and administrators and actions against guardians of persons *non compos mentis,* to collect probated claims must be brought within four years from the date of the qualification of the guardian, as provided by Section 2295, Code of 1930, allowing an additional six months within which suits may not be instituted against the guardian as provided by Section 1715 Code of 1930.

In *Liddell v. Strong,*[7] Liddell had been appointed guardian of the estate of some children by the name of Sullivan. The guardian was also, at the time of such appointment, the cashier of the Louisville Home Bank and continued to serve as cashier until the bank closed on January 6, 1931. On May 10th the guardian reported that he had on hand $3,500.00 in surplus funds of his ward and obtained an order of the Chancery Court directing him to place it on time deposit in his bank at four per cent. The bank closed on January 6, 1931. The liquidation of the assets of the bank paid 42% to depositors, leaving a 58% loss of the deposit of said ward. The lower court removed Liddell as guardian and appointed W. A. Strong, Jr., as his successor. The successor guardian brought suit against the former guardian to recover the loss to the estate. The court found as a fact that subsequent

[7]183 Miss. 805, 184 So. 432 (1938).

to placing the money on time deposit, developments were such as to sufficiently warn the guardian as a diligent and prudent trustee that the condition of the bank was such as to gravely endanger the said deposit, but he did nothing about it and allowed the funds to remain until the final collapse of the bank. Liddell defended his conduct by asserting that while he was the guardian of these children he was also cashier of the bank and occupied the position of trustee not only to his wards but to every depositor of the bank, with no more right to make a withdrawal to save these wards than he would to save any other depositor, and that to attempt to withdraw for all would mean an instant collapse as to all, with no probability that any of them would receive any more than was in fact received by them under the course which he took. The court, while sympathizing with the guardian for the difficult and embarassing position in which he found himself when the gloom of the early days of the depression began to lower, nevertheless, adhered to its decision in *Brandau v. Greer*,[8] and *Heard v. Daniel*,[9] and reannounced the rule that whenever a guardian finds himself so situated that, because of an adverse interest either personally or as a trustee or agent for others, he cannot in vital particulars give undivided allegiance to his wards, his proper course is to forthwith resign his guardianship, turning over to his successor all the ward's estate and furnishing to his successor at the same time all the material information which he has which bears upon the safety and the preservation of that estate, and, failing to do so he must stand fully responsible for all foreseeable consequences of his acts. Consequently, the court held Liddell liable for the funds lost to the estate.

In *Newsom v. Federal Land Bank*,[10] the Chancery Court of Panola County entered a decree appointing a receiver to handle and manage certain lands belonging to the estate of minor wards of the court, which wards had at the time a duly appointed, qualified and acting guardian. The receiver then filed a petition requesting permission to file a suit in the Chancery Court against former guardians who had been removed for the loss of reasonable rents on said lands since 1928 that had not been collected by the guardians through inattention and mismanagement. The Chancery Court entered a decree allowing the receiver to file the suits, and the suits were filed against the former guardians in the court where the guardianship was pending. The former guardians, in defense, plead the lack of power in the Chancery Court to appoint the receiver and to authorize him to bring suit against

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[8]95Miss. 100, 48 So. 519 (1909).
[9]26 Miss. 451 (1853).
[10]185 So. 595 (Miss. 1939).

them, asserting that full control of all property belonging to the estate was in the guardian and that he alone had power to sue. The court, however, reasoned that it is easily conceivable that conditions may arise during the guardianship of wards or during the administration of estates which make an investigation of the affairs of such guardianship or administration appropriate and desirable or even necessary; that in certain cases it would be unjust, inefficient and harmful to remove a guardian or administrator prior to such inquiry; that the power in a court, in which an administration is pending, to conduct an inquiry to determine what is required by law and justice to the parties, is necessary to the proper and efficient administration of such estates. Accordingly, the court held that the Chancery Court has the power to appoint a receiver to take possession of property belonging to the ward to the exclusion of the guardian and, under the orders of the court, take such measures as to the court may seem necessary or proper to determine the rights of the ward and protect them.

In *Prudential Insurance Company v. Gleason*,[11] a minor had been appointed by the Chancery Court as guardian of her four minor sisters and brothers and, as such, proceeded to file suit for partition of certain lands. The partition was had under orders of the court and later, discovering the invalidity of the partition, the four children brought suit to set aside the partition as to certain lands that had been alloted therein to their mother and subsequently lost by her through foreclosure of a mortgage executed by her subsequent to the partition. The court reasoned that, although the statutes are silent on the subject, yet the appointment of a minor as guardian of another minor would not be within the purposes for which a guardian is appointed. A guardian is appointed to guard the interests of another person, who, by reason of infancy, lunacy or the like, is incapable of guarding his own interests without aid, and it would be an anomaly that a minor, disabled by reason of his infancy, should have another minor, likewise disabled and incompetent, to take care of him as guardian. Under the facts of the particular case the court allowed the partition decree to be collaterally attacked and held the partition void because the minors were not in court under the pleadings and process in the partition suit.

C. Husband and Wife

In *Hopper v. Hopper*,[12] the Supreme Court reannounced the now well established rule that on a husband's appeal from a de-

[11]187 So. 229 (Miss. 1939).
[12]183 Miss. 621, 183 So. 504 (1939).

cree granting his wife separate maintenance and attorney's fees the wife is entitled to the legal services of an attorney to assist her in defending the decree and to an allowance of alimony pending appeal to enable her to maintain her rights when the case is heard on the merits, and that on motion of the wife for such allowance, the sole concern of the court is the necessitous circumstances of the wife and the obligation of the husband to pay suit money and attorney's fees before being allowed to proceed on his appeal.

D. Infants

In *Prudential Insurance Company v. Gleason*,[13] the court held that minors are not competent to waive statutory requirements enacted for their protection with respect to the manner in which the jurisdiction of the court may be exercised and that the statutory requirement that a minor sue by next friend requires the next friend to be an adult, and that in a statutory partition proceeding wherein minors were represented by another minor as next friend, the proceeding was void as to all parties and the decree was open to collateral attack. There is, however, in this case a recognition of the rule that in the exercise of general common law or equity jurisdiction, the fact that a minor is not represented by next friend is a procedural matter and not one of substance. The court also recognized that partition proceedings are of equity origin and, in the absence of statutory regulations, courts will exercise their powers according to the ordinary rule, but, the court reasoned that where instead of leaving a particular matter to be proceeded with under ordinary common law rules in law or in equity, the lawmaking power has expressly prescribed by statute the particular manner in which the particular jurisdiction may be exercised, a substantial compliance with the mode thus prescribed is, as to its protective features, mandatory, rather than directory and dispensable.

In *Forbus v. Cobb Bros. Construction Company*,[14] a minor was employed by the construction company to guard their trucks and machinery that had been collected at a point on the highway to prevent same from being tampered with. He was instructed not to permit anyone to go about the trucks or machinery and not to do so himself. On the morning of the day on which the minor was killed a foreman of the company came to him and, observing that rain was likely, instructed him in case it should rain to go to a nearby house or into the cab of a dragline, which would

[13]187 So. 229 (Miss. 1939).
[14]185 So. 243 (Miss. 1939).

afford protection against the rain. About the middle of that day a severe rain came up with some wind, lasting about an hour. After the rain was over the deceased was found under one of the truck bodies, the particular truck being equipped with a lever and machinery operated by hydraulics by which the body of the truck could be raised or lowered. There was a lever both above and below the body of the truck by means of which it could be released and when so released the body would descend. The Supreme Court held there was no liability; that the deceased quite probably went under the truck to get out of the rain and that curiosity prompted him to manipulate the machinery or lever which controlled the body of the truck, which act was no part of his duty and in violation of his instructions; that an employer even of persons under age, is not an insurer of his employee's safety but, in order to recover for an injury, the injured person must have been engaged in the master's business at the time of the injury and must be acting in the scope of his employment.

E. Marriage

In *Bourland v. Hathcock*,[15] Bourland married a Mrs. Pickle in 1934 and lived with her as his wife until December, 1935, at which time she died intestate. Mrs. Bourland left no children or descendants of children but was survived by several brothers and sisters and descendants of brothers and sisters. The brothers and sisters and descendants of deceased brothers and sisters brought suit against the surviving husband to determine the right of succession to the property left by Mrs. Bourland and alleged that the marriage between Mr. and Mrs. Bourland was void for the reason that Bourland had formerly married one Dorothy Hunt, who was living and undivorced at the time of his marrige to Mrs. Bourland. The court held that the marriage was presumed to be valid, but the presumption yields to the facts and that while the burden rests upon those who challenge the validity of the marriage to prove that defendant had at the time he married deceased a wife by a former marriage, who was still living and from whom defendant had not been divorced, yet this burden would not require proof that the wife could not and did not obtain a divorce at a place other than the county in which she resided, but only required proof that it was reasonably certain that she did not do so and that the evidence introduced justified the court in ordering that no such divorce had been obtained. It is also interesting to note that the court held that one who had examined public records of the county where defendant's wife resided

[15]188 So. 9 (Miss. 1939).

was competent to testify that no divorce appeared thereon, and that it was not necessary to call the custodian of the records for the purpose of making the proof.

F. Parent and Child

In *Forbes v. Warren*,[16] the Chancellor filed a finding of facts, which is here set out for a full understanding and is as follows:

> "The court finds that Mollie Jo Warren, minor child of Mr. and Mrs. J. E. Warren was born on the 22nd day of March, 1924. Mrs. J. E. Warren, the mother of said child, was the daughter of Mr. and Mrs. A. S. Forbes, respondents here. Mrs. J. E. Warren, mother of Mollie Jo Warren, died about three or four hours after the birth of Mollie Jo and the child was placed by her father in the home of Mr. and Mrs. A. S. Forbes, who have had her custody since. The court finds that the child, at the time of the institution of this habeas corpus proceeding was over the age of thirteen years, and had attained the age of fourteen before judgment in this cause was entered.
>
> "The court finds that the child expresses and has a sincere desire to remain in the custody of her maternal grandparents, Mr. and Mrs. A. S. Forbes, and if her wishes were considered alone she would select the home and custody of her maternal grandparents. The court finds that the father, J. E. Warren, married again on the 23rd day of February, 1934. The court finds from the evidence in this case that there is nothing against the character or suitability of either the maternal grandparents, Mr. and Mrs. A. S. Forbes, or the father, J. E. Warren, or his second wife, Mrs. J. E. Warren, that would render either of them unsuitable to have the care, custody and control of said child and that the physical and spiritual welfare could be safely entrusted to either the maternal grandparents or the father and his second wife, Mrs. J. E. Warren, and that the child has received the proper care and attention by the maternal grandparents during the time they have had her custody.
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> "Respondents forcibly argue and urge that the father, J. E. Warren, abandoned his child and that the best interest of the child, Mollie Jo Warren, would be best served by permitting her to remain with her maternal grandparents with whom she desires to live but the court

[16] 186 So. 325 (Miss. 1939).

finds from all evidence in the case that the father, J. E. Warren, did not without just cause forsake or desert his child as to show any intent to shirk or evade his duty to her or that he sought to evade the duty, trouble or expense of rearing it or had a reckless disregard for its welfare or that he was guilty of such abandonment of it as to bar his right to afterward reclaim its custody and for this reason the court cannot adhere to the wishes of the child to remain with her maternal grandparents and for this reason it is the duty of the court to award the custody of the child to the petitioner, J. E. Warren. A decree may be drawn accordingly."

In the main opinion of the court the following language is used as the *ratio decidendi*:

"The question is, whether those considerations should be controlling, under the facts of this particular case. We are of opinion that they should be. It is true that, everything else being equal, the father is entitled to the custody of his child. Nevertheless, 'the welfare of the child or children is the matter of chief importance; and the consideration of their welfare will prevail over any mere preponderance of legal right in one or the other party . . . . The age, sex and physical condition of the child are often important elements in determining what custody would be for its best welfare . . . . *The wishes of children of sufficient capacity to choose for themselves should be given especial consideration when their parents have, for a long time, voluntarily allowed them to live in the family of another, and the court will make no coercive order in such cases to enforce the mere legal right of the parent to their custody against the manifest inclination and reasonable choice of the children to remain where they are*'. 20 R. C. L., sec. 15, pages 601-603."

The court proceeded to award the girl's custody to her maternal grandparents.

The text in *Ruling Case Law* cites two cases in support thereof, *Marshall v. Reams*,[17] and *Richards v. Collins*.[18] In the case of *Marshall v. Reams*, cited as authority by *Ruling Case Law*, the testimony showed that the punishment inflicted on the 16 year old child by his uncle had left scars upon his body and that on one

[17]32 Fla. 499, 14 So. 95 (1893).
[18]45 N. J. Eq. 283, 17 Atl. 831 (1889).

occasion the uncle had struck him over the head with a hammer handle, causing such a contusion as resulted in a permanent scar easily visible at the time of the trial. The court was eminently correct in holding that the best interest of the child required its custody to be placed with the stranger, and the decision does not turn on the right of the parent to the custody of his child or the right of the child to express a controlling preference, but turns on the question of the unsuitableness of the parent and the best interest of the child requiring that he be placed in the custody of a person where he would be humanely treated and properly provided for.

The statement in *Ruling Case Law*, cited by the court above in *Forbes v. Warren* is practically an exact copy of a portion of the language of the court in *Richards v. Collins*. It appears from this quotation that the language in *Ruling Case Law* did not encompass the entire meaning of the opinion in *Richards v. Collins*, being only a brief quotation and freed from the later limitations in the opinion to the effect that "the strict right of the parent will be passed by, if a judgment in observance of such right would substitute a worse for a better custodian". This limitation brings the opinion in *Richards v. Collins* within the well established rule that the welfare of the child shall be the pole star guiding the court in awarding the custody of the child.[19]

If any other construction is given to the case of *Richards v. Collins*, the case is in apparent conflict with former decisions of the Mississippi Court.

The conclusion of the court in *Forbes v. Warren* might be reached by reasoning that the relation of parent and child involves both the duty of the parent to support, maintain, rear, and educate, and the correlative duty on the part of the child to be subservient and obedient to and abide with its parents, and that where the parent has failed to perform the duties imposed upon him by the relation, then his conduct does not so characterize the relation of a parent as to entitle him to come before the court and seek the privileges of a parent. This reasoning, however, has heretofore been rejected by the Supreme Court of Mississippi in at least five cases.[20]

> "As against all save the mother, the father has the supreme right to the control and custody of his child un-

[19]Hibbette v. Baines, 78 Miss. 695, 29 So. 80 (1900).

[20]Moore v. Christian, 56 Miss. 408 (1879); Hibbette v. Baines, 78 Miss. 695, 29 So. 80 (1900); Watts v. Smylies, 116 Miss. 12, 76 So. 684 (1917); Nickle v. Burnett, 122 Miss. 56, 84 So. 138 (1920); Sinquefield v. Vallentine, 159 Miss. 144, 132 So. 81 (1931).

less he has forfeited this right by immoral conduct, or by an abandonment of the child, and that the mere fact that the affections of other people have attached to and grown for the child, and that they may have had temporary custody of it, under circumstances not amounting to abandonment on the part of the parent, does not warrant the court in depriving the parent of his child or children."[21]

"It will be seen from the statute above cited (Code 1930 Sec. 1863) that the father and mother have equal rights as to the custody of their children, but, as between the father and mother, and other persons, the father's or mother's right is superior to third persons, and they could only be deprived of the custody of their child by showing their unfitness to have such custody and control over it."[22]

Corpus Juris, relying on the authorities herein referred to, states the rule as follows:

"The preference of a child who is of sufficient age to exercise discretion in choosing its custodian is entitled to much weight, especially where the dispute is between the parents or between third persons. Where, however, the dispute is between the person legally entitled to the custody on the one hand, and a person having no legal right on the other, the mere preference of the child will not as a rule be allowed to prevail over the legal right, although even in such case it may be considered on the question of welfare, and in connection with other circumstances may outweigh the legal right."[23]

Judge Ethridge, in a strong dissenting opinion in *Forbes v. Warren,* said, "I fear that we have unsettled the law, and reached a conclusion that will trouble us in the future, because I can see no way to harmonize the present decision with the many referred to, and quoted from above".

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[21]Nickle v. Burnett, 122 Miss. 56, 84 So. 138 (1920).
[22]Sinquefield v. Vallentine, 159 Miss. 144, 132 So. 81 (1931).
[23]46 C. J. 1241, 17.

V.

INSURANCE

*W. Calvin Wells**

During the last two terms of the Supreme Court of Mississippi, to-wit: September, 1938, and March, 1939, there were decided by that court eighteen noteworthy cases involving the general subject of Insurance. Of these, six cases involved the subject of Life Insurance; five cases involved Casualty Insurance; and seven cases involved Health and Accident Insurance.

A. Life Insurance

Mutual Life v. Nelson,[1] is probably the most interesting case involving insurance law decided by the court during that period of time. Prior to that decision our Supreme Court had rendered decisions in three other insurance cases involving similar facts and law.[2]

In each of those cases it was held that there existed in the contract of insurance an ambiguity which should be solved against the insurance company and in favor of the insured, so that a surrender charge could not be deducted in arriving at the amount available on lapse of policy, for the purchase of automatic extended life insurance.

In all three of these cases, as well as in the case of *Mutual Life v. Nelson,* the policies provided that after a certain number of years, should the premium not be paid and the policy lapse, then it (the policy) should have a certain value, and three options were given as to how that value should be repaid or refunded by the company to the insured: (1) By Cash Surrender Value or Loan Value, payable in cash; (2) By Automatic Extended Insurance for an amount near the face amount of the policy but for a short period of time; and (3) By a Paid-Up-Policy of Insurance for a small amount but paid up for life. The last two values were such as the Cash Surrender value would buy under the formulas laid down in each policy of insurance, and each of these three values was to be the mathematical equivalent of the other two.

In the three cases above named, prior to the decision of the *Nelson* case, the court held that only in case the policy was actually surrendered to the company for the cash value, a sur-

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*Member Mississippi and Hinds County Bars; Jackson, Mississippi.

[1]184 So. 636 (Miss. 1938).

[2]New York Life v. Blaylock, 144 Miss. 541, 110 So. 432 (1926); Lamar Life v. Minor, 170 Miss. 223, 154 So. 542 (1934); New York Life v. Boling, 177 Miss. 172, 169 So. 882 (1936).

render charge (provided for in the contract of insurance) could be deducted, but that unless the policy was physically surrendered no surrender charge could be deducted from the reserve in arriving at the cash value which was to be used in the purchase of the other two forms of insurance.

These three cases have been criticized in courts of last resort in other states, and are not sustained by any decisions of the court of last appeal in any other state in the Union.

In the recent case of *Mutual Life v. Nelson,* it was argued by the insurance company that if the court under the doctrine of ambiguity did not permit the deducting of the surrender charge from the reserve in arriving, not only at the cash surrender value, but also at the value in automatic extended insurance or in paid-up-insurance, it compelled the insurance company to violate the anti-discrimination statute of Mississippi.[3]

The court in its decision in *Mutual Life v. Nelson,* did not overrule the three previous decisions, but differentiated the facts from the facts in those cases, and held that the surrender charge should be deducted from the reserve, not only in arriving at the cash surrender value but also in arriving at the amount to be used under the contract in the purchase of either automatic extended insurance or in paid-up insurance.

This decision is in line with all of the decisions of all the other courts of last resort in the other states in which this proposition of law has come up for decision.

In the case of *Mississippi Benevolent Ass'n. v. Brooks,*[4] it was held that a policy of insurance which was to become effective on February 1st, but which neither in the application nor in the policy fixed the hour on February 1st when the policy would become effective, would become effective and take effect at the earliest moment of February 1st.

The study of the adjudicated cases in America as to when a policy of insurance takes effect and becomes in force and effect is an interesting one. Fire insurance policies usually fix the specific hour of the day, and provide whether Standard Time or Daylight Saving Time should apply. Life insurance policies, on the other hand, usually do not fix a specific day and hour when they become effective, but provide a rule or formula under which the time is fixed for the policy to become effective, according to the time when

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[3]Miss. Code Ann. (1930) § 5171.
[4]185 So. 569 (Miss. 1939).

certain steps are taken. Usually this rule or formula provides that the policy shall be in force and effect upon the delivery to the insured of the policy during his lifetime and good health after payment of the first premium.

Many interesting questions have arisen under this rule from varying statements of facts as to when such policies did go into effect.

This same case came before the court on suggestion of error,[5] when it was held that the burden was on the insurer to establish if it could, that the policy was not mailed until after the insured's death, and that the record in the case was insufficient to establish the affirmative defense that the policy was not actually placed in the mail until after the insured's death.

In the case of *Vance v. Life & Casualty Insurance Co.*,[6] the court held that a life policy provision, limiting the insurer's liability in the event of suicide within two years, to the amount of premiums paid, was a clause independent of the incontestable clause providing for incontestability after two years. So that in case the insured committed suicide within the two-year period, the insurer was not liable for the face amount of the policy notwithstanding the suit to recover on the policy was brought after the expiration of the contestable period.

In the case of *Cherry v. Bivens*,[7] the court had before it for consideration the constitutional rights of officers of subordinate lodges of fraternal insurance companies. It held that before suspension, such officer shall have a right to a hearing as to the facts alleged to constitute good cause for suspension, and that to provide otherwise would constitute inequitable, arbitrary action; further, that an equity court will not afford relief to one guilty of such misconduct which would perpetrate wrong and injustice to others. Complainants, therefore, in a suit, claiming to be officers of a lodge, did not come into equity with clean hands in filing their bill for accounting of moneys collected by persons suspended as lodge officers without notice or opportunity for hearing on charges against them.

In the two cases of *North Carolina Mutual Life v. Sanders*,[8] and *North Carolina Mutual Life v. Green*,[9] it was held that bills of complaint of insured against an insurer to recover for fraud

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[5]185 So. 817 (Miss. 1939).
[6]186 So. 647 (Miss. 1939).
[7]187 So. 525 (Miss. 1939).
[8]188 So. 554 (Miss. 1939).
[9]188 So. 556 (Miss. 1939).

after denial of liability for cash surrender value of his policy, upon the theory that the insurer had assigned its business in Mississippi and had fraudulently induced the insured to continue payment of her premiums to assignee, which became insolvent, stated good causes of action.

In the latter case the court also held that under the above circumstances, the insured would be entitled to recover from the original insurer any unpaid dividends and other benefits accrued under the policy as of date of the insolvency of the assignee, as against the contention that the insured, by failing to exercise the option to receive the cash surrender value, had waived such right, and that such non-action resulted in the automatic extended insurance of the insured, and, therefore, it followed, that the suit was not prematurely brought.

B. Casualty Insurance

The case of *U. S. F. & G. Co. v. Yost,*[10] had to do with the question of waiver of forfeiture and as to what law was applicable—whether the law of the state where the accident occurred, or the law of the state where its court is hearing the issue. Our court held that the rules of substantive law of a state where the cause of action arises are to be applied by the court of the forum, but the quantum of proof required is governed by the law of the forum. It also held that slight circumstances of intention to waive forfeiture of provisions of an insurance policy are sufficient to support the finding of waiver, and that the law will seize on them as evidence of an intention.

In the case of *U. S. F. & G. Co. v. Wilson,*[11] the court reiterated the rule repeatedly laid down by it to the effect that when one is injured while performing an act which he intended to do, proceeding throughout the entire course of its performance in the manner intended and without any unpremeditated deflection therefrom, the fact that the ultimate injurious result was unexpected, does not make out a case of an injury accidentally suffered.

In the case of *Hartford Accident & Indemnity Co. v Delta & Pine Land Co.,*[12] a very interesting question arose as to whether the laws of Tennessee or the laws of Mississippi were applicable. If the laws of Tennessee were applicable, then there was no liability on the part of the insurance company; if the Mississippi laws were applicable, there was liability. The court held that in

[10]183 Miss. 65, 183 So. 260 (1938).
[11]185 So. 802 (Miss. 1939).
[12]188 So. 539 (Miss. 1939).

the case where the application for a policy of indemnity covering defalcations of employee was dated at Memphis, Tennessee, and the employee indemnified was at that time employed in that city, and the policy was delivered to the employer at its offices in Tennessee, then the obligations of contract were controlled by the laws of Tennessee, notwithstanding the defalcations later occurred and the loss was payable in Mississippi.

In the case of *Merchants Company v. Hartford Accident & Indemnity Company*,[13] the court gave the very broadest meaning and extent of liability to a policy of insurance covering automobile liability. The court stated that under the facts the question was not free of difficulty and, decided either way, must stand on narrow ground. It was held that although the injury to plaintiff was not the proximate result of the use of the automobile truck, nevertheless the insurance contract under construction did not require that the injury must be the proximate result (in the strict legal sense of the term) of the negligent act which happened in the actual use or operation of the truck.

It appeared in this case that a truck of the Merchants Company went into a roadside ditch on the public highway, and that it was necessary to use several large poles in extricating the truck, and that when this was done the operator of the truck drove away and left the poles in the road. Later a traveler in a passenger automobile ran into one of the poles and was injured. The policy of insurance was held broad enough to cover such liability under such circumstances.

In the case of *U. S. F. & G. Co. v. State, Use Merchants Bank & Trust Co.*,[14] it was held that the Superintendent of Banks in charge of the liquidation of an insolvent bank could not lend the insolvent bank's funds to another bank and trust company; and if he did, and the second bank and trust company to whom the loan was made, subsequently became insolvent, then such funds so on deposit were not public funds within the statute giving preference to public funds under Section 2914 of the Mississippi Code of 1930. Furthermore, if judgment was gotten against the Superintendent of Banks and his surety on his bond, for such funds so loaned, then all parties to the transaction must be made parties to the suit so that complete justice might be done, and the Superintendent of Banks and his surety awarded subrogation to rights accruing to him under the above statements of facts.

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[13]188 So. 571 (Miss. 1939).
[14]188 So. 911 (Miss. 1939).

C. Health and Accident Insurance

In the case of *Metropolitan Life v. Perrin*,[15] the question of accord and satisfaction arose, and our court decided it in line with a long holding of cases in Mississippi, which line of holding goes further than the holdings generally in other states. Our court held that it is immaterial whether the creditor's claim is liquidated or disputed. It, therefore, again held that a debtor's payment of any amount of a debt is sufficient consideration for creditor's agreement to accept such amount in full satisfaction, irrespective of whether the debt is liquidated or disputed. Where the creditor accepts payment of less than the full amount of his claim in satisfaction of the claim, the fact that the creditor protests against receiving the smaller amount is of no consequence to prevent the acceptance from constituting an accord and satisfaction. The case further defines, under the decision on the pleadings, what constitutes a speaking demurrer.

In the case of *Metropolitan Life v. Evans*,[16] the court rendered a decision on a question arising under the privileged communication statute.[17] A review of the decisions of the Supreme Court of this state construing this privileged communication statute shows that the very broadest application that could possibly be given has been extended to this statute notwithstanding the fact that it is in contravention of the common law and would ordinarily be strictly construed. In this case, however, a limitation in the construction of this statute has been given which, in the opinion of the writer, is manifestly correct. The court held that where the insured voluntarily presents himself to a physician, employed by the insurer to make physical examination of the insured and to report the result thereof to the insurer, and not for the purpose of receiving treatment, the expense of the examination being paid by the insurer, the privilege of the statute relating to communications made to physicians by patients did not arise but was waived, since the insured was not a patient of the physician seeking professional advice within the terms of the statute.

Another very interesting case is that of *Columbian Mutual Life v. Craft*,[18] in which the court upheld liability for alleged total and permanent disability benefits of the insured as against a fraternal insurance company. The policy or certificate provided for benefits which arose in case of the insured's illness which

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[15]183 So. 917 (Miss. 1938).
[16]183 Miss. 859, 184 So. 426 (1938).
[17]Miss. Code Ann. (1930) § 1536.
[18]185 So. 225 (Miss. 1938).

prevented him from following *or directing* any gainful labor, trade, occupation, business, or profession, and the court held the company liable for total and permanent disability benefits notwithstanding that the insured, being the Circuit Clerk of his county, did perform, all during the time he claimed to be totally and permanently disabled, the duties of that office, in performing which duties he handled books and papers, but only those when within easy reach, and in the performance of which duties he admittedly and without any dispute, *directed* the hired help to perform all the other duties of the office. This was a hard case on the facts, it appearing that the insured Circuit Clerk was disabled by incurable arthritis and that he was unable to bend his back or his legs, and could move only with pain.

The record further shows that suit was not filed by plaintiff until about ten years after he had defaulted in the payment of monthly dues on the fraternal contract. There was a provision in the policy contract for waiver of premiums, but a requirement that due or satisfactory proof be made of the disability as a condition precedent. Craft offered to make the proof and the company denied liability. The court held that this was tantamount to furnishing the proof.

It was plead in the lower court that the company fraudulently concealed from plaintiff his rights and, therefore, concealed the cause of action, and plaintiff relied upon these affirmative allegations as bringing the case within the exception provided in the statute of limitations.

The court in its opinion, however, held expressly that there was no fraud nor concealment and that everything was done in good faith, but that the contract was a continuing one and the plaintiff had a right to recover disability instalments accruing within six years prior to the filing of the suit, but that those installments accruing prior to six years were barred by the statute of limitations.

In its suggestion of error the defendant took the position that inasmuch as no premiums were waived and inasmuch as the court had ruled that the plaintiff's rights during the first four years were barred, that the whole contract was barred for failure to pay the premiums or offer to pay them. The decision of the court, however, was to the contrary.

In the case of *Columbian Mutual Life v. Eaves*,[19] in line with previous decisions of this court as to agency, it was held that notice to the local collection agent of the fraternal insurance company

[19]185 So. 557 (Miss. 1939).

was not in compliance with or a waiver of the mandate of the constitution of such company as to how claims should be propounded and to whom.

The court in this case reaffirmed its previous holdings that unless so stipulated in the contract, insanity of the insured would not waive the requirements as conditions precedent to the payment of claims for total and permanent disability, citing three earlier decisions in support thereof.[20]

In the case of *Metropolitan Life v. Lindsey*,[21] the court for the first time construed the meaning of "due proof" required by contracts of insurance of the total and permanent disability of the insured, and held that due proof means proof within a reasonable time considering all the surrounding facts and circumstances, and that this question of what constitutes due proof is ordinarily for the jury, but that it is for the court where the delay is clearly unreasonable.

In the case of *Mutual Benefit Health & Accident Association v. Johnson*,[22] the court again laid down the rule that a jury verdict cannot be allowed to stand upon merely a scintilla of evidence or upon a mere possibility or conjecture, and that courts in civil cases act upon reasonable probabilities, and that in trials under the common law to prove a possibility only or to leave the issue to surmise or conjecture is never sufficient to sustain a verdict.

VI.

MUNICIPAL CORPORATIONS

*Lester G. Fant, Jr.**

A. Governmental Powers and Functions

While no new principle was evolved in the decisions upon the governmental powers and functions of municipal corporations, useful light was shed upon the line dividing those powers which are granted by implication from those which are not.

The care required in the use of the word "implied" in describing such powers is illustrated in *Davenport v. Blackmur*.[1] The decision depended upon the power of a municipality to engage in the business of testing automobiles, as contemplated by Chapter

[20]New York Life v. Alexander, 122 Miss. 813, 85 So. 93 (1920); Berry v. Lamar Life, 165 Miss. 405, 142 So. 445, 145 So. 887 (1933); Brotherhood *etc.* v. Bridges, 164 Miss. 356, 144 So. 554 (1932).

[21]185 So. 573 (Miss. 1939).

[22]186 So. 297 (Miss. 1939).

*Member Mississippi and Marshall County Bars; Holly Springs, Mississippi.

[1]186 So. 321 (Miss. 1939).

200, Laws of 1938. A bill was filed to enjoin the municipality from purchasing equipment for the purpose of establishing a testing station, and from a decree sustaining a demurrer, the complainant appealed.

Section 2406, Code of 1930, grants broad powers of police regulation in general terms. And the relation of the business of testing automobiles to the promotion of public safety is clear. Nevertheless, the court draws the clear logical distinction between the power of police regulation and the power of engaging in business that may be performed by private enterprise. The grant of the one does not imply the other, though it might properly be given.

Section 133 Chapter 200, Laws of 1938, reads in part: "However, be it further provided when a municipality installs and operates an inspection station conforming to the standards set up by the commission and approved by the commission, then no other inspection stations shall be issued a permit to make official inspections in that municipality;" *etc.* This is not, in its terms, a grant of power. If the word "imply" is used in its conversational meaning, an implication may be discovered. But there is a possibility, which is not explored in this opinion, that some municipality operating under a special legislative charter may have such power. Therefore, in logic, the necessity for any such implication is lacking. The language quoted is no more than a recognition, as the court says, "that some municipalities either have or may be given power to operate a business of this kind."

On the other hand, the legislative grant of power to a municipality by logical implication is found in *American-LaFrance, Inc. v. City of Philadelphia.*[2] As an incident to the decision of this case the question arose whether a municipality had the power to lease fire fighting equipment. Section 2391 of the Code of 1930 gives the broad power to purchase and hold real estate and personal property. Such broad power, it was held, carries within it the lesser power to lease, in the absence of an inhibition arising from the nature of the use and control of the property. So, also, with the broad language with respect to fire fighting equipment in section 2428, Code of 1930, its language, being broad, is not limited to performance by purchase.

Further delineation of this question is supplied by *Fitzgerald v. Town of Magnolia.*[3] In this case the appellant entered into a written contract with the appellee on its minutes by which he was

[2]183 Miss. 207, 184 So. 620 (1938).
[3]183 Miss. 334, 184 So. 59 (1938).

to receive fifty percent of all back taxes collected as a result of his discovering and having placed on appellee's assessment rolls any real estate which had escaped assessment. The question was whether the municipality had the power to employ a tax assessor in addition to the one provided by law. The court held that no such power was expressly granted by charter or to be "reasonably inferred from powers expressly granted." From the context of the opinion the words quoted are taken to mean that such power is not a necessary incident to any power granted.

B. Proceedings of Council or Governing Body

The validity of ordinances was considered in *Garraway v. State* ex. rel. *Dale*.[4] The municipality had duly adopted an ordinance establishing a fire limit district and regulating the type of buildings that could be erected or reconstructed within that district. The ordinance contained the following provision: "That any building or buildings, house or houses, structure or structures, erected, constructed, enlarged, repaired or replaced at or on any place within said limit in violation of this ordinance may be removed from said fire limit by the authorities of the town of Prentiss, Mississippi, at the expense of the owners of such building or buildings, house or houses, structure or structures and such building or buildings, house or houses, structure or structures may be condemned and sold by the authorities of said Town to pay the expense so incurred in such removal thereof."

The quoted section of the ordinance was held to be unenforceable for the reason stated by the court that "no machinery was set up in the ordinance for its effective enforcement." A writ of mandamus having been issued commanding the mayor and board of aldermen to enforce this ordinance, the court reversed the judgment awarding the writ and dismissed the petition.

And a subsequent ordinance was void because it was passed by number only without setting forth its provisions in the minutes of the board.

The question in *Morris v. City of Columbia*[5] was the validity of a zoning ordinance. Sections 2474 *et seq.*, Code of 1930, govern the adoption of zoning ordinances. Section 2476 provides that "Such regulation shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets;" *etc.* Section 2477 provides that no such regulation shall become

[4]185 So. 803 (Miss. 1939).
[5]186 So. 292 (Miss. 1938).

effective until after a public hearing at which citizens and parties in interest shall have an opportunity to be heard. Publication of fifteen days' notice of the time and place of such hearing is required.

In *Morris v. City of Columbia* the board of mayor and aldermen of the city published notice of its intention to adopt a zoning ordinance and set a time and place for a hearing thereon. No one appeared at the time and place designated and the city attorney was then instructed to prepare a zoning ordinance. The ordinance so prepared was later adopted. It was held that the sections quoted above require that the comprehensive plan of the proposed zoning ordinance be prepared before the notice is published, and that the failure to follow this procedure made the zoning ordinance void.

In *Chinn v. City of Biloxi*[6] the mayor and commissioners placed an order on the minutes reducing their salaries. This was not published in the manner in which an ordinance is required to be published. The statute conferring power to make such reductions, Chapter 224, Laws of 1932, provides that the salaries may be reduced by an "ordinance" entered on the minutes. The question was whether the reduction of salaries was valid without publication as an ordinance. The court held that the word "ordinance" in the statute was equivalent to the word "order" and that no publication or enrolling in the ordinance book was required.

In *City of Vicksburg v. Melsheimer*[7] the municipal board was engaged in revising assessment rolls. At the close of a regular meeting, the minutes were concluded with the recital: "On motion the board adjourned to meet from day to day and time to time to revise the assessment rolls." There was a lapse of two days between this adjournment and the next meeting of the board. The appellee contended that the failure to meet on the day following the adjournment quoted exhausted the adjournment order; that the meeting held was a special meeting which required a written call.

The court, in its decision, treated the meeting as a special meeting, and held that since all members were then present and acting the failure to give written notice was immaterial. This decision is expressly limited to the facts of the case.

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[6]183 Miss. 27, 183 So. 375 (1938).
[7]183 Miss. 517, 184 So. 68 (1938).

C. Officers and Agents

In *Maryland Casualty Co. v. Town of Terry*[8] Chapman gave a bond to the town with the Maryland Casualty Company as surety, for the faithful performance of his duties as night watchman. The board of mayor and aldermen had previously entered an order on its minutes electing Chapman night marshall, requiring a bond, and appointing him night watchman until the bond should be secured.

Dubose brought suit on this bond for an alleged assault and battery which was charged to have been committed by Chapman in discharge of his official duties. The court held that there could be no recovery against the surety.

The duties of a night marshall were said to be "to apprehend any suspicious persons, to make arrests, and to preserve the peace." Those of night watchman were "watching streets and business sections; making rounds of the town." It was held that the remedial statute, Section 2888, Code of 1930, did not make his bond as night watchman effective to cover his actions as night marshall.

D. Contracts

Where a contract purported to be made by a municipality for the purchase of machinery is within the objects authorized by law and the contract is void for want of compliance with legal requirements for its making, the seller may recover the property and a reasonable compensation for its use. Such was the holding in *American-LaFrance, Inc. v. City of Philadelphia.*[9]

The views of courts of other jurisdictions on this problem are divided into three groups and considered in the opinion of the court. One group permits recovery in all such cases as on principles of quasi-contract that would be applicable to natural persons. The second group, to meet these ends of justice and avoid giving opportunities for favoritism or extravagance on the part of the municipality, permits recovery only where the transaction is free from suspicion of corruption and the defect is only some omission of a technical nature. The third group permits no recovery of compensation, holding that considerations of the public interest outweigh the implied obligation to pay what the use of the property is worth. The court adopts the view of the second

[8]185 So. 228 (Miss. 1938).
[9]183 Miss. 207, 184 So. 620 (1939).

group as the rule in Mississippi, though saying that as between the two extremes its preference would be the view of the third group rather than that of the first.

In this case, the appellant filed a bill to foreclose a vendor's lien on a fire truck which had been purchased by the mayor in the name of the city and had not been paid for. The bill contained a prayer in the alternative for the recovery of the truck and compensation for its use. The contract by which the truck was purported to be sold to the city was void for want of proper recitals in the minutes of the board of mayor and aldermen. The court held that there could be no recovery upon a void contract; that the contract being void, no title passes and therefore there could be no recovery in *quantum valebat;* but that there could be a recovery of the truck and of reasonable compensation for its use, less a credit to the city of the sums paid on the purchase price.

The effect of this decision as a precedent is not altogether clear. The decision was rested in part upon *Crump v. Board of Supervisors of Colfax County,*[10] which permitted recovery from the county as in *quantum valebat* for the lease of offices where the lease contract was void. In a specially concurring opinion, Judge Anderson indicates that the two cases, *Amite County v. Mills*[11] and *Smith County v. Mangum*[12] are inconsistent with the *Colfax* case and are overruled by the instant decision. These two cases allowed no recovery from a county in *quantum valebat* for the erection of a bridge and the construction of a road, the contracts therefor being void. Yet, in the opinion in chief in the case, the court distinguishes these two authorities, without referring to them specifically, saying that the *Colfax* case is the only decision in point in Mississippi.

In *City of Hattiesburg v. Cobb Bros. Constr. Co.,*[13] the court held that a bidder for a public contract could not withdraw his bid on the ground that he had made a mistake in calculation, in the absence of written notice of withdrawal setting up the nature of the mistake. Public authorities have no power to permit the withdrawal of a bid in the absence of circumstances which would make a refusal to permit its withdrawal inequitable. In order to determine whether such circumstances existed, it was necessary for the mayor and commissioners to examine the mistake on which the bidder relied. This they could not do without being informed of its precise nature.

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[10]52 Miss. 107 (1876).
[11]138 Miss. 222, 102 So. 465 (1925).
[12]127 Miss. 192, 89 So. 913 (1921).
[13]183 Miss. 482, 184 So. 630 (1938).

The question arose in an action to recover money deposited with the bid as a guarantee that the bidder would enter contract. Recovery was denied.

E. Torts

A question of the liability of a municipal corporation in tort was left open in *Weems v. Lee*.[14] This was an action against the city of Hattiesburg and the owner of a building for injuries received when an awning fell. The awning was erected by the owner of the building and extended over a sidewalk of the city.

The action was brought in Forrest county, while the household and residence of the owner of the building was in Lamar county. The appellant, owner of the building, asked a change of venue on the ground that the city of Hattiesburg was fraudulently joined as party defendant to deprive him of the right to have the venue of the action in Lamar county. His motion was overruled. The city of Hattiesburg received a directed verdict.

It was held that the duty of the city with respect to such an awning had never been determined by the courts of Mississippi, and the city therefore could not be said to have been fraudulently joined. The duty of a city in such case was not presented for decision and was expressly left undecided.

In making repairs upon the city hall, a municipality is acting in its governmental capacity was the holding in *Jones v. City of Amory*.[15] Accordingly, there could be no recovery for injuries received by a carpenter when the scaffolding on which he was working fell.

F. Fiscal Management and Taxation

In *Lear v. Hendrix*,[16] a bill was filed to cancel a tax title. The municipality operated under a special charter and had adopted an ordinance under authority of this charter fixing the first Monday in March as the day for municipal tax sales. The tax sale in question was made on the first Monday in March rather than on the first Monday in April. The court held that the sale was not therefore void, but that the ordinance controlled since the statute provided that no code chapter sections should repeal any of the provisions of special municipal charters, and the statute fixing the first Monday in April as the date for such sales was not operative to change the ordinance.

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[14]187 So. 531 (Miss. 1939).
[15]185 So. 237 (Miss. 1939).
[16]187 So. 746 (Miss. 1939).

In the same case it was held that where there was no provision in the ordinances contrary to the statute providing that lists shall vest in purchasers a perfect title and failure to transmit or record a list or a defective list shall not render the title void, the statute controlled the procedure, and such defects would not make title void.

That a decree validating bonds could not be collaterally attacked where it adjudicated all the facts necessary to show validity and was rendered by a court of competent jurisdiction, was the holding of *Town of Decatur v. Brogan.*[17]

The two cases, *City of Clarksdale v. Fitzhugh*[18] and *City of Clarksdale v. Stuart*[19] deal with the evidence and instructions proper in appeals from judgments assessing the value of property for taxation. It is held that evidence and instructions upon the theory that the true value of property is the price which the owner would be willing to accept and would expect to receive if he were disposed to sell to another who was able and willing to buy are proper in such proceedings.

VII.

PLEADING, PRACTICE AND PROCEDURE

Including Appeals, Remedies and Evidence

*C. W. Taintor, II**

A. APPEAL AND ERROR

I. Criminal Cases

(a) Trial Errors.

The court has had before it these three interesting situations: (1) There were various errors committed during the trial of a case in which the defendant's own evidence showed his guilt beyond a reasonable doubt. (2) There were various errors committed, no one of which, standing alone, constituted reversible error. (3) No motion for peremptory instruction nor for a new trial was made, in a case in which the evidence entirely failed to show guilt of the crime charged.

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[17]185 So. 809 (Miss. 1939).
[18]185 So. 587 (Miss. 1939).
[19]185 So. 588 (Miss. 1939).
*A. B. Harvard 1918; LL. B. Harvard 1935; LL.M. Harvard 1936; S. J. D. Harvard 1939. Professor of Law University of Mississippi, School of Law.

In the first situation—errors committed, but defendant's own testimony showed his guilt—the court affirmed, in *King v. State*,[1] a conviction of manslaughter upon the ground that such testimony, in a court which has jurisdiction to try the indictment, is as effective as a plea of guilty; and, in such a case there will be a reversal only if the errors committed amount to a denial of the fundamentals of criminal procedure. There appears no statement of the nature of the errors committed on the trial.

In the second situation—accumulation of errors no one of which, alone, is reversible—the following errors were committed in *Russell v. State*:[2] (1) The prosecuting attorney was allowed to comment upon the failure of the defendant's wife to testify.[3] (2) Two of the State's most material witnesses in chief were introduced as the last witnesses in rebuttal.[4] (3) The assisting special prosecutor was allowed to testify in rebuttal that he had not advised the defendant to feign insanity.[5] This witness's evidence was characterized as testimony to an extraneous and highly prejudicial issue, but its admission did not, alone, constitute reversible error.

In reversing the conviction of the defendant upon the ground that this accumulation of non-reversible errors had resulted in failure to give the defendant a fair trial, the court, speaking through McGehee, J., said:

> "Neither did right or justice demand, nor expediency require, the taking of any undue advantage of the accused. If he is to be hanged, it should not be done until a jury shall have so determined on a trial purged of the errors and extraneous matters here disclosed."[6]

This language, reminiscent of the ringing words spoken in the Wire Tapping Case (No. 1)[7] by Mr. Justice Holmes[8] and Mr. Justice Brandeis,[9] in individual dissenting opinions, appears to put Mississippi clearly in that group of jurisdictions which realizes that the duty of courts is not only to do justice in particular cases but, also, to do justice justly.

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[1]188 So. 554 (Miss. 1939).
[2]189 So. 90 (Miss. 1939).
[3]This is not reversible error. Carter v. State, 99 Miss. 435, 54 So. 734 (1912).
[4]Nor does this constitute reversible error. Roney v. State, 167 Miss 817, 150 So. 774 (1933).
[5]After a hearing before the judge, in the absence of the jury this witness was declared competent as, though consulted by defendant, he had not borne to defendant the relation of attorney-client.
[6]189 So. at 93.
[7]Olmsted v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. ed. 944 (1927).
[8]*Id.* at 469.
[9]*Id.* at 485.

The third situation—evidence entirely fails to show guilt of crime charged, but no motions for peremptory instructions or for new trial—offers another example of the court's insistence that justice be done justly. In *Cogsdell v. State,*[10] the defendant conducted his case without the assistance of counsel. The evidence may have shown guilt of some crime of the same general nature as that with which he was charged in the indictment, but there was no evidence showing his guilt of the particular crime. The court said that conviction without evidence was like taking a default on the merits and that that was a fundamental error in felony cases; and reversed the conviction and remanded the case.

In civil cases it is the general practice of appellate courts to require that the parties point out his errors to the trial court and thus give him a chance to correct them; and if the appellant has failed to offer an opportunity for correction by objection, motion or request, to refuse to consider alleged errors.[11] This is the practice even when the appellant asserts unconstitutionality of a statute, if he makes his assertion for the first time on suggestion of error.[12]

To some extent the rule is the same in criminal cases. Failure to object testimony on the trial is fatal: the appellate court will not consider the admissibility of testimony unless there was objection.[13]

In criminal cases, however, many courts, among them our court, reach the conclusion that the State must give the defendant a fair chance even if he fails to demand a particular right. In cases where this fair chance is not given the court is likely to talk in terms of denial of a fundamental right of criminal procedure. A fundamental right is denied even where guilt of the crime actually charged is proven beyond a reasonable doubt, if the jury was made up of less than the requisite number,[14] and neither by failure to object nor by express approval can the defendant waive this fundamental.[15] The rule is the same if the defendant is charged with the murder of Tobias Wallace and it is proven

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[10]185 So. 206 (Miss. 1938).

[11]Clarksdale v. Fitzgerald, 187 So. 573 (Miss. 1939) (*infra*, n. 56); Roberts v. International Harvester Co., 181 Miss. 440, 180 So. 747 (1938) [See work of the Miss. S. Ct., 1937-38, Kimbrough, *Pleading, Practice and Procedure* (1938) 11 Miss. L. J. 1, 49]; Rhoda v. Drake, 125 Me. 509, 131 Atl. 573 (1926); Shenandoah Milling Co. v. Phosphate Prod. Corp., 161 Va. 642, 171 S. E. 681 (1933); Jorgenson v. Oregon-Washington R. & Nav. Co., 176 Wash. 399, 29 P. (2d) 744, 33 P. (2d) 898 (1934), *cert. denied,* 293 U. S. 620, 55 S. Ct. 215, 79 L. ed. 708 (1934).

[12]Stone v. Martin Veneer Co., 184 So. 433 (Miss. 1938) (*infra* n. 29).

[13]Matthis v. State, 80 Miss. 491, 32 So. 6 (1902).

[14]Hunt v. State, 61 Miss. 577 (1884).

[15]*Id.* at 580.

that he killed Tobias Hollis, even when the evidence for the defendant is directed to the killing of Hollis[16] and although the indictment could have been amended to conform to the proof.[17]

When we consider the words of McGehee, J., in *Russell v. State,* the words of McLean, J., in *Clark v. State*: "To permit the conviction to stand in a case where the party is charged with killing one person, and where the record shows conclusively that he killed another person, is akin to the court joining in the mob and executing the party under the form but without the authority, of law . . . . Our conscience recoils with absolute horror from such a proposition", and the approval in *Cogsdell v. State*[18] of both the result and the language of the *Clark* case, we acquire a clear perception of the position of our court; a perception which is not clouded, but is made more clear by the first case discussed, *King v. State.*

(b) Errors In Sentence.

Decisions defining the function of the court in reviewing sentences or the process of sentencing in criminal cases have been reached in two important situations: (1) An excessive sentence was imposed in the trial court. (2) Suspension of sentence was revoked by the trial judge without giving the criminal a hearing upon the issue of violation of the conditions of suspension.

In the first situation—excessive sentence—it was held in *McCaffrey v. State,*[19] that the imposition of an excessive sentence will not cause remand for re-sentence as the trial court has wide discretion and the safe course is for the Supreme Court to leave correction of the severity to the Governor. The court did not foreclose the possibility of review of such sentences if there should appear, under the facts of a particular case, so great an excess that it would either constitute denial of due process or come within the category of cruel and unusual punishment, even though within the limits of the law.

In the second case, *Reynolds v. State,*[20] the appellant was convicted and sentenced: the sentence was suspended during good

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[16]Clark v. State, 100 Miss. 751, 57 So. 209, 38 L. R. A. (N. S.) 187, Ann. Cas. 1914A, 463 (1912).

[17]*Id.* 100 Miss. at 756-7. It appears, however, that an indictment charging the murder of "Tobias Hollis" need not be amended to support a conviction for the murder of "Ahab Tobias Hollis". Wood v. State, 64 Miss. 761, 8 So. 273 (1887).

[18]This case cannot be classified as representative solely of the protection given to a defendant who has no counsel at the trial because the defendant in the *Clark* case, note 16, *supra,* was represented by council, and the denial of the "fundamental" was claimed for the first time on appeal.

[19]187 So. 740 (Miss. 1939).

[20]187 So. 528 (Miss. 1939).

behaviour, and the suspension was later revoked. The opinion was in a single short sentence, fortified by citation of *Cooper v State*,[21] to the effect that a revocation of suspension is not appealable.[22]

II. Civil Cases

The variegated nature of the matters treated by the court in civil cases precludes a useful classification of the nature made in discussing the criminal cases, and makes more useful a list of the decisions with discussion of those which present the more interesting and less well settled doctrines and problems.

In *Holmes v. T. M. Strider Co.*[23] the court reiterated the rule, announced in many prior cases, that upon appeal from a judgment given upon a verdict rendered upon a peremptory instruction the evidence must be construed most strongly against the successful party.

In *Jackson v. Leggett*[24] an instruction was given for defendant to the effect that verdict must be rendered for defendant unless plaintiff proves both the assault and battery and the insulting language, where plaintiff alleged both in a one count declaration. In the same case an instruction was given for plaintiff to the effect that the jury must find for the plaintiff if they believe that defendant struck plaintiff and used insulting language, or that he struck her without using such language. It was held that the defendant's instruction was erroneous and was not cured by the plaintiff's instruction, but that, the two instructions being in hopeless conflict, the judgment for defendant must be reversed.

In *Chas. Weaver & Co. v. Phares*,[25] the appellant had introduced in evidence a mass of papers showing expenditures for which he sued. On appeal he maintained that these papers would show his right to recover some of his expenditures if they were properly audited and the expenditures segregated. The court held that it is not the function of an appellate court to make a detailed examination of a mass of exhibits and to do the duty of the party, who should have so presented his case to the trial court that it could have reached a decision without itself segregating items of expenditure. This is an application of the rule that the party with the burden of proof must prove his case through his own accounting and that he does not carry that burden by merely putting in evidence the means of doing the accounting.[26]

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[21]175 Miss. 718, 168 So. 53 (1936).

[22]Limitations of space forbid extended comment here on these two cases. A comment will appear in an early issue.

[23]189 So. 518 (Miss. 1939).

[24]189 So. 180 (Miss. 1939).

[25]188 So. 12 (Miss. 1939).

[26]Cranford v. State, 162 Miss. 158, 138 So. 589 (1931).

In *Mississippi Road Supply Co. v. Hester*[27] it was held that it would be improper for the court to consider the merits of a case brought by a taxpayer who was not authorized by law to bring the case.

In *United States Fidelity & Guaranty Co. v. Rice*,[28] plaintiff had a decree in trial court against a sheriff and his surety. The latter, only, filed a supersedeas bond conditioned upon the satisfaction of the decree. It was held that the decree was so severable that the supersedeas superseded the decree as to the surety alone, leaving the decree against the sheriff in full force, and reversal as to the surety alone was proper.

In *Stone v. Martin Veneer Co.*[29] the court refused to pass upon a constitutional objection to a statute urged for the first time on suggestion of error and not raised by the pleadings.

In *Mississippi Power & Light Co. v. Tripp*,[30] Ethridge, P. J., defines clearly, with citation of earlier cases discussing the same subject,[31] the power and duty of the Court with respect to review of facts found by a jury. He concludes that, on the whole, trial by jury is a satisfactory method of determining facts, a method sanctioned by long usage; and, remarking that there are many cases in which the court would have reached a different result from that reached by the jury, reaffirms the doctrine of the court that there will be no review of the facts unless the verdict is so overwhelmingly contrary to the weight of evidence that the court concludes that the verdict was the result of passion, prejudice or corruption.

This doctrine was applied in *Smith v. Smith*,[32] where the court refused to reverse a finding of testimentary capacity and absence of undue influence by the jury on the trial, although it seemed to the court that the great preponderance of the evidence established the contrary.

A very interesting application of the same doctrine was made in *Faulkner v. Middleton*.[33] In that case the jury found a verdict for the plaintiff, but awarded grossly inadequate damages. Re-

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[27]188 So. 281 (Miss. 1939).
[28]186 So. 620 (Miss. 1939).
[29]184 So. 433 (Miss. 1938).
[30]183 Miss. 225, 183 So. 514, 518 (1938).
[31]Shelton v. Underwood, 174 Miss. 169, 163 So. 828 (1935) (The opinion in this case discusses the power and duty of the trial judge); Davis, Dir. Genl., v. Temple, 129 Miss. 6, 91 So. 689 (1922).
[32]188 So. 305 (Miss. 1939).
[33]188 So. 565 (Miss. 1939) (sugg. of err. overruled, 190 So. 910 (1939), with an enlightening opinion of Griffith, J., on the question of verdicts which are "against the overwhelming weight of the evidence").

lying on *Scott v. Yazoo & M. V. R. Co.*[34] as marking the time when the court was committed to this particular aspect of the doctrine and saying that reference to *Whitehead v. Newton Oil & Mfg. Co.*[35] would illuminate the reason therefor, the court reversed the judgment and remanded the case for retrial on the issue of damages alone.[36]

In *Schwartz v. McKay*[37] plaintiff had judgment in justice of the peace court: defendant took the case to county court on *certiorari*, where plaintiff again had judgment: defendant *appealed* to circuit court, which dismissed the appeal on the ground that defendant had not applied for *appeal* in the manner directed by statute:[38] he then *appealed* to the Supreme Court and plaintiff moved to dismiss the appeal on the ground that no appeal lies in such cases, under § 705, Code of 1930.[39]

The court overruled the motion to dismiss, on the ground that wrongful dismissal of an appeal by the circuit court deprives the appellant of his day in court contemplated by the statute, and held that the question of error does not arise on the motion to dismiss.

Although the court said that both parties admitted that no constitutional question was presented by the record, it seems possible to explain this decision upon the ground that denial of a day in court presents such a question.[40]

An even simpler method of reaching the decision was indicated in *Reynolds v. State*, stated at P. 54 *supra*, in *Schwartz v. McKay* the court considered § 705, Code of 1930, applicable upon the ground that *certiorari* is one of the methods whereby appellate jurisdiction is exercised. It seems that it would have been much simpler, and harmonious with the *Reynolds* case, to have construed the statute literally, and to have held that § 705 did not apply because the case was not *appealed* from justice of the peace court to the county court.

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[34]103 Miss. 522, 60 So. 215 (1912).

[35]105 Miss. 711, 63 So. 219 (1913).

[36]Lack of space forbids adequate comment here. A comment on this case will appear in an early issue.

[37]185 So. 200 (Miss. 1939).

[38]Miss. Code Ann. (1930) § 704.

[39]". . . there shall be no appeal from the Circuit Court to the Supreme Court of any case which originated in a justice of the peace . . . court and was thence appealed to the county court and thence to the circuit court unless in the determination of the case a constitutional question be necessarily involved . . .".

[40]Miss. Const. (1890) § 24.

In *Robertshaw Trustees v. Columbus & Georgia R. Co.*,[41] the doctrine that the Supreme Court will not reverse the trial court for error unless it be shown, not only that there was error, but also that the court was given a fair, and definitely presented, opportunity to correct or avoid the error, was again stated. Thus, where the answers of a witness in a tort case indicated that the defendant was insured and, where the trial judge ruled against the improper evidence and took all other steps to eradicate the objectionable matter, there will be no reversal for a new trial, where there was no request for a new trial made below.

The court intimated that there might arise a case so extreme that it would be the duty of the trial judge to grant a new trial of his own motion and that, in such a case, failure so to do would constitute reversible error.

Jackson County v. Meaut[42] presents a novel, an interesting and an important problem. Here the plaintiff had judgment below: the defendant appealed: there was reversal and remand: plaintiff, appellee, filed an affidavit of poverty and moved that the mandate be sent down without payment of costs on appeal. His motion was sustained over defendant's objection that § 3406, Code of 1930, was mandatory.

Strict construction of the applicable statutes would lead to the opposite result as § 3406, which provides for certification of the mandate on remand, is in terms of condition precedent[43] and § 663, which provides for affidavits of poverty, applies in terms to the *commencement* of actions.[44] McGowen, J., in dissent, was of the opinion that the case was ruled by *Mobile & O. R. Co. v. Watly*,[45] wherein it was said that the payment of costs was a condition precedent to the right to demand certification of affirmance or reversal, and that § 663 was intended to give the poor person the benefit of a trial in the trial court.

The court, however, speaking through Ethridge, P. J., was of the opinion that none of the earlier cases precluded the instant decision,[46] and that the reversal left the cause in the same situa-

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[41]188 So. 308 (Miss. 1939).

[42]189 So. 819 (Miss. 1939).

[43]"Every final judgment or decree rendered . . . by the Supreme Court shall be certified by the clerk thereof to the clerk of the court from which the case was brought, or to which it is remanded . . . if the costs accrued in the Supreme Court shall be paid to him . . .".

[44]"A citizen may commence any suit or action, or answer a rule for security for costs in any court without being required to prepay fees or give security for costs, before or after commencing suit, by taking and subscribing the following affidavit . . .".

[45]69 Miss. 475, 12 So. 558 (1891).

[46]It is to be noted that no affidavit of poverty was filed in the *Watly* case which McGowen, J., deemed controlling.

tion as before rendition of judgment below. The court construed the applicable sections of the Code together with § 24, Constitution of 1890[47] and, in this connection, Judge Ethridge quoted the following cogent words from his opinion in *Meeks v. Meeks*:[48]

> "Under the Constitution all persons are entitled to maintain an action in the courts . . . . and the courts shall be open and justice shall be administered without sale, denial or delay. It is the policy of the law that every person, however humble or poor, may resort to the courts for the vindication of his rights and the redress of his wrongs. Justice must be granted to every person, whether such person is able to pay the costs or not."

While the decision in the instant case goes only to its peculiar facts—a plaintiff-appellee moving for certification of the remand—the result should be the same if the motion is made by a plaintiff-appellant or a defendant-appellant or -appellee.

It is submitted that retrial after reversal and remand is in effect an original trial and, unless a party eligible to file an affidavit of poverty is allowed certification of the affirmance or reversal he either is, or appears to be, denied justice. In the case of a plaintiff-appellee or -appellant it is too late to take a nonsuit and begin over, a procedure which would clearly bring him within the terms of § 663. Liberal construction of the applicable sections of the Code is justified and demanded by the requirements and appearance of justice. The confidence of society in the regularity of judicial administration requires that men think they are getting justice as well as that they do get justice.[49]

In *Hayes v. Abney*[50] the court reiterated the doctrines that it is the duty of the Supreme Court to raise the question of its own jurisdiction on appeal; that appellate jurisdiction is entirely statutory; that the tribunal created by § 15 of the Corrupt Practices Act[51] is an inferior court within the meaning of § 172, Constitution of 1890; that direct appeal to the Supreme Court under § 15(d) of the Act could constitutionally be provided by the legislature;[52] and that the Supreme Court, on appeal, would

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[47]"All courts shall be open; and every person for an injury done him . . . shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

[48]156 Miss. 638, 643, 126 So. 189, 190 (1929).

[49]See Taintor, *Restitution of Property Transferred under Void or Later Reversed Judgments* (1936) 9 MISS. L. J. 157, 161, 182.

[50]188 So. 533 (Miss. 1939).

[51]Miss. Laws (Ex. Sess. 1935) c. 19.

[52]See Drummond v. State, 185 So. 207, 209 (Miss. 1938).

render the judgment which should have been rendered by the special tribunal, accepting as true the facts found by the tribunal and the supplemental undisputed facts certified by the trial judge in the special bill of exceptions.

Ethridge, J., dissented upon the ground that, as noted by the majority, the findings of the tribunal were not complete in that no facts were found upon certain points of law, and that untold mischief will result from converting the Supreme Court to an appellate court exercising revisory powers upon matters of fact as well as upon matters of law. He decries this construction of the Act as a conferral of appellate jurisdiction by construction, and because it results in imposing upon the court the function of finding the facts in accordance with its own conception of the evidence, and because "this Court is not equipped to perform such duties."[53]

The decision of the court fills up a hole in the Act, which provides for no review of the facts if the findings had unanimous concurrence below; for review of the facts if there was disagreement below or if less than two commissioners attended; but which makes no provision for the case which here arose—conclusions of law below with no findings of fact to support them.

It may well be that the dissent takes the preferable position with respect to cases in which the facts are in dispute or in which any evidence might have to be presented to the Supreme Court. Where, however, the facts material to the conclusion of law are undisputed and are shown in the bill of exceptions, it seems that the Supreme Court goes through the same intellectual processes if it applies the law to the facts that it would have gone through if the undisputed facts had been unanimously found by the tribunal below. The duty of going through those intellectual processes the court is, by definition, "equipped to perform". It is submitted, moreover, that where, as in this case the appellee has not objected to the inclusion of the undisputed facts in the bill of exceptions and to its inclusion in the record, the interest of the state in the prompt conclusion of litigation is a strong influence towards a construction of the Act which will lead to as early a final judgment as possible. This interest is clearly shown in § 15(d) of the Act, which provides that "the appeal shall be immediately docketed . . . . and shall be decided at the earliest possible date, as a preference case over all others".

Two interesting cases showing the operation of the doctrine of judicial notice in the appellate court, were decided.

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[53]See *per* Ethridge, J., 188 So. 533, 538 (Miss. 1939).

In the first, *Columbian Mutual Life Insurance Co. v. Croft*,[54] the court took notice of the fact that, in counties in which the business of the Circuit Court is not heavy, the Circuit Court clerks usually do, themselves, nearly all or a large part of the work of the clerk's office.

In the second, *Jefferson Standard Life Insurance Co. v. Noble*,[55] the court took notice, in a case holding the Mortgage Moratorium Act of 1938 unconstitutional, that there no longer existed in 1938 "a public emergency .... a crisis .... [nor] a catastrophe", as there did in 1934. The court said that, in order to acquire the knowledge upon which to base judicial notice, it was proper to resort to any properly authenticated public document, to government publications, dictionaries, geographies, or other books, periodicals and public addresses.

In order to show the foundation for the judicial notice taken in this case the court adverted, without disclosing the source of its knowledge, to the comparative quantities and prices of cotton produced in the State in 1934 and 1937 and the intervening years; and to the total farm income over the same period. It spoke also, giving the sources of its information, of the following facts in the same period: (1) Voluntary sales of farms in the State and of tax sales therein [statement of U. S. Dept. of Agriculture]; (2) Gross retail and income tax collections [report of Miss. Tax Comm.]; (3) The complete lack of credit facilities for farmers in 1934 and the facilities now avaliable under federal statutes [48 Stat. 31]; (4) The closing of banks in 1933, the present increase of surplus in banks, the lack of cries of distress in regard to banking, the fact that the five banks which were discontinued in 1936-38 all paid off in full [report of State Comptroller of Banks]; (5) The resolution of the Legislature impounding all funds in the Treasury, contrasted with the present most healthy condition of the State Treasury [Treasury Report].

The court, in *City of Clarksdale v. Fitzgerald*,[56] reiterated the doctrine that judgment for the appellant cannot be entered in the Supreme Court where he did not request a peremptory instruction below.

B. EVIDENCE

(a) Competency of Witnesses

In *Metropolitan Life Insurance Co. v. Evans*[57] the trial court excluded the proffered testimony of a physician who had ex-

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[54]185 So. 225 (Miss. 1938).
[55]188 So. 289 (Miss. 1939).
[56]187 So. 533 (Miss. 1939).
[57]184 So. 426 (Miss. 1938).

amined the insured appellee, with his consent, for the purpose of reporting to the insurer, appellant. The court reversed upon the following grounds: (1) The testimony of the physician was not within the statute giving a privilege in physician-patient cases,[58] because the appellee was not a patient of the physician and had not gone to him for professional advice. (2) By voluntarily presenting himself for examination by a physician for the insurer, the insured had waived the privilege.

While it is clear that the decision was correct and wise, it does offer grounds for speculation as to the effect of the language in cases where the physician acts both as consulting physician for one party and examining physician for the other. Would it be possible for a physician to segregate the information he received while examining one party for the other, from that which he received while examining the party for purpose of advice and treatment? The difficulties inherent in that situation may lead physicians to refuse to act in the double capacity, and cause the court to apply the privileged communications statute as a measure of safety if physicians do so act.

In *Carroll v. State*[59] the court inferentially expressed its adherence to the uniform doctrine that the wife of a criminal defendant, even his common law wife, is incompetent as a witness for the state, but held that no reversible error was committed where all of her testimony, except that the defendant told her that he had been in a fight, that the police might be looking for him, and to get his [blood-spotted] clothes out of the house, appeared in the other evidence, including the confession of the appellant.

So long as it remains the policy of the law to protect men against the testimony of their wives, and of course *vice versa*, it seems that the rule of incompetency should not be tampered with. In cases of this kind, where all of the wife's testimony comes out in other evidence, it is probable that no great harm is done. Suppose, however, that the wife's testimony is *relied upon* to corroborate a confession or an admission—like those appearing in the testimony in this case—is there not grave danger that the jury will believe the wife upon the ground that the defendant would be likely to tell the truth in the situation and that a wife would be unlikely to lie in order to incriminate her husband? In any case, a wife's testimony of the nature of that here appearing seems to have more than merely cumulative effect and, for that

[58]MISS. CODE ANN. (1930) § 1536.
[59]183 Miss. 1, 183 So. 703 (1938).

reason, to come well within the policy behind the exclusionary rule. For that reason it is to be hoped that the rule of this case will be carefully confined.

In *Ford v. Byrd*[60] it was held that the "dead-man's statute"[61] did not render incompetent the testimony of a witness whose evidence tended to negative a claim against an estate.

The same statute was in question in *McFarlane v. Plant*[62] where the witness was a distributee of the estate of a decedent who had a claim against the estate of another decedent. It was held that the witness was competent as he was not attempting to establish "his own claim" against the estate.

Under the common law rule of the incompetency of an "interested" witness, and under those statutes which preserve the disqualification in cases where one party to a transaction is dead, there is a confused and confusing mass of cases determining the special relations to the decedent and to the transaction which constitute disqualifying "interest".[63] The terms of our statute have offered an opportunity to minimize this confusion and our court has wisely chosen the path which will avoid it. The doctrine of our court, confining incompetency to the witness who tries to prove *his* claim, must have the approbation of Dean Wigmore, who decries the common law rule and its anachronistic survival in cases where a party to the transaction is dead.[64]

(b) Admissibility of Evidence

A situation not unlike that in the last case appeared in *Church v. State*[65] and received the same kind of treatment. Here it was held that the written confession of another, who had participated in the crime, was admissible, where the substance of the confession was later repeated orally in the presence of the defendant who did not deny the statements then made—except that she did deny that she "cut the deceased"—and where, on later repetition by the other of a statement that she had cut the deceased, defendant said: "Yes, I cut him", and where defendant later confessed to the cutting.

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[60]183 Miss. 846, 184 So. 443 (1938).
[61]Miss. Code Ann. (1930) § 1529.
[62]188 So. 530 (Miss. 1939).
[63]See 2 Wigmore, Evidence (2d ed. 1923) § 578; 70 C. J. § 350, nn. 25, 26.
[64]See Wigmore, *op. cit., supra*, n. 63. See also the very recent case. Lucas v. Hamilton, 105 F. (2d) 800 (App. D. C. 1939), in which an exclusionary statute was strictly construed in favor of the competency of the witness.
[65]182 Miss. 802, 183 So. 525 (1938).

It is clear that the confession of another, even of an accomplice, is inadmissible against a criminal defendant.[66] It is equally clear that adoptive admissions by speech or by silence are admissible against him.[67] In a case like the instant case, where defendant admits the facts appearing in the confession of the other, by express adoptive admission and by voluntary confession, little actual prejudice, if any, is caused by the admission of the confession. The weight of the evidence is merely cumulative. It is difficult to see, however, how the non-prejudicial nature of the improperly admitted evidence cures the error committed in admitting it. It is more probable that the error is not cured, but is not reversible as it is not prejudicial.

In *Smith v. Smith*[69] it was held that it was error to allow *questions* about various transactions regarding which an attorney-witness was advised in his professional capacity, although the objections to the questions were repeatedly sustained. The competency of the attorney, as to each of the transactions, should have been determined, as a preliminary matter, in the absence of the jury.

In *Baylis v. State*[70] it was held that a defendant is entitled to have a preliminary hearing in the absence of the jury upon the admissibility of a dying declaration, and that the error inherent in the admission of such a declaration after a preliminary hearing in the presence of the jury is not cured where the hearing failed to show, beyond a reasonable doubt, that the declarant had a settled conviction of impending death. The court refused to express an opinion as to the result if the preliminary hearing had shown this settled conviction beyond a reasonable doubt.

The quotation, with approval, from *People v. Falletto*[71] makes it fairly evident that the court will regard dying declarations with suspicion, and will refuse to weaken the exclusionary rules in order to uphold the admission of such evidence. In that case it was pointed out that the fear of punishment is not regarded as so effective a sanction as it was in the days when this exception to the hearsay doctrine was established; and that actual experience, for which the court cited cases, has shown that a dying declaration made today may be contradicted by another made tomorrow, and that dying persons do make false, self-serving declarations to exculpate their friends or destroy their enemies.

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[66] 2 WIGMORE *op. cit., supra,* n. 63 § 1076.
[67] *Id.* §§ 1071-73. See also Mississippi cases cited 183 So. at 526.
[68] Compare Revised Rules of the Supreme Court of Mississippi, Rule 11, 161 Miss. 903, 905 (1931).
[69] 188 So. 305 (Miss. 1939).
[70] 182 Miss. 794, 183 So. 527 (1938).
[71] 202 N. Y. 494, 96 N. E. 355 (1911).

An analogous question was decided in *Lewis v. State*,[72] the suspicion there being directed to fresh outcry of rape in cases in which complaint of the essential acts to establish rape or assault with intent to rape are wrung from a child by her parent, either through threats of punishment or through leading questions. Smith, C. J., pointed directly to the distinction between general questions addressed to the child by the parent and questions directed to specific acts of the accused, and to the fact that questions falling in the first category[73] do not make the complaint involuntary for evidentiary purposes, while questions falling in the second category do so operate.[74]

The distinction may perhaps be expressed as follows:—If the question is directed towards discovering the reason for some manifestation of the child which is not directly or necessarily indicative of assault or of rape, the answer is admissible. If, however, the question contains a suggestion as to the answer, particularly if the answer will naturally be a bare affirmative or negative, the answer is inadmissible.[75]

It is, of course, to be understood that, as said in this case, the evidence is immaterial in cases of statutory rape upon the issue of consent, but that it is material upon the issue of recent fabrication by the child.

In *Bourland v. Hatchcock*[76] it was held that an attorney at law may testify that he examined judicial records and found no decree of divorce between the parties therein, for the purpose of proving the negative issue—that there had been no divorce. It was also said that any person who showed sufficient knowledge of public records could testify to their contents.

The court said, however, that the manager of an Abstract Company could not testify that his company kept a complete daily record of all divorces granted in the county in question and that the company's record did not show any divorce decree between the parties. The reason given was that the manager did not testify from a personal examination of the judicial records, but from a

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[72]184 So. 53 (Miss. 1938).

[73]Examples from various cases are: "What is the matter?"; "Why are you crying?"; "Why did you lock the door?".

[74]Examples are: "Did so-and-so assault you?"; "Did he do such-and-such to you?". Smith, C. J., was careful to point out that questions of this nature are entirely proper for the parent's own information, and that the issue is solely whether such questions destroy the voluntary nature of the answers for purposes of evidence.

[75]It would seem that—"What happened then?"—is on the dividing line and that the admissibility of the answer thereto might depend upon the presence, or the nature, of earlier questions.

[76]188 So. 9 (Miss. 1939).

memorandum made by another who made the personal examination. It is true that this is triple hearsay—the manager testifies that the recording employee of the abstract company declared that the observing employee declared that the clerk of the court declared that no divorce decree was rendered between the parties—but it seems no more objectionable than to allow a superior official of a corporation to testify that the corporation records show that some clerk recorded a report made by another employee who actually observed an event, in order to prove the happening of the event. This type of testimony is modernly received through the application of the socalled 'business records' exception to the hearsay rule.[77] In the duty of the observing employee to his employer inheres sufficient sanction to impel truth and accuracy: in the duty of the recording employee inheres sufficient sanction to the same end.

If this is a question of 'best evidence' the testimony of an attorney who has actually examined the records decreases the danger of error. Suppose, however, that the judicial records were lost and the only available evidence were that of the manager of the abstract company, would there not be grave danger of miscarriage of justice if he could not testify from a "memorandum made by another"?

In *Quan v. State*[78] a novel situation arose. The question was on the admissibility of admissions made voluntarily by the defendant during an illegal search of his premises. In the only other case directly in point, which has been found, the Indiana Supreme Court held the evidence admissible upon the grounds that the constitutional protection given to the citizen against illegal search and seizure is distinct from the protection against compulsion to give evidence against himself, and that a voluntary admission or confession is not obtained through the search but through voluntary answers to questions.[79] In distinguishing an earlier Indiana case, the court intimated that the criterion of the voluntary nature of a confession was the absence of fear, whether that fear was induced by independent threats of the searching officers or by the fact of search. That is to say, no admission or confession is voluntary which is in fact induced by fear and, if the fear is caused by illegal acts upon the part of public officers the confession or admission is inadmissible whether the acts are directed to obtaining an admission or confession, or to search.

[77]E. I. Du Pont de Nemours Co. v. Tomlinson, 296 F. 634 (C. C. A. 4th, 1924).
[78]188 So. 568 (Miss. 1939).
[79]Milbourn v. State, 212 Ind. 161, 8 N. E. (2d) 985 (1937).

Our court reached the same conclusion as the Indiana court, but did not follow the reasoning of the latter. It was first conceded, for the purposes of the instant case, that the following evidence obtained in the course of an illegal search is inadmissible: (1) Everything of an inanimate or insensate nature, or of which knowledge is acquired through the use of any of the five senses;[80] (2) Statements made in ignorance of the presence of the searchers or not intended to be heard by them; (3) Statements intended to be heard by the searchers, when the statements are induced by means "which take away or substantially detract from those statements, that which is requisite to make them free and voluntary".

The reasoning of the court, in holding the evidence admissible, was directed to the lack of essential connection between the search and the statement made by the defendant during the search. Admissibility, then, is dependent upon fear, or the lack thereof, instilled into defendants by illegal pressure which is independent of the search or, perhaps,[81] by an improperly violent search.

If this analysis of the reasoning of the Indiana and the Mississippi Supreme Courts is correct, the difference in result in individual cases will arise from the emphasis placed by the former upon the subjective element of the duress imposed upon the criminal defendant by the illegal search.[82] Our court, on the other hand, will emphasize the subjective element, factual fear instilled in the defendant, only with respect to the impropriety of acts of the public officers directed to eliciting admissions or confessions, or acts directed to the manner of the search rather than to the fact of search. Thus, statements of the defendant, made during illegal search, will be admissible in his criminal prosecution unless the officers made threats for the purpose of causing the statements, or unless the officers, solely for the purpose of making the search effective, acted in an improperly violent manner and the defendant was frightened by the improper conduct into making the statement.

It is submitted that an approach which separates the protection against unreasonable search and seizure from that against forced self-incrimination does not lead to an examination of the effectiveness of the sanctions applicable to illegal searches. The pro-

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[80]The distinction is between reaction to physical stimuli and reaction to communications directed to the intelligence. Thus, the barking of a dog, the presence of a human being, or involuntary ejaculations of a human being are within this category.

[81]See 188 So. at 569.

[82]The Indiana court will determine whether the fact of search frightened the particular defendant, and whether that search was illegal.

tection against forced self-incrimination is accorded primarily to persons who have been charged with crime. That against unreasonable search and seizure is accorded to protect all persons from "fishing expeditions" and the sanction is directed to stopping illegal searches before they start. It may be that what is needed is a re-examination of the premises leading to the conclusion that illegally obtained evidence is inadmissible, in order to justify the continued presence of Mississippi among the minority of states which adhere to this doctrine, or in order to lead to a change to the majority group.[83]

The admissibility of evidence offered to impeach a witness was considered in two cases. In *Hartfield v. State*[84] it was said that the fact of a prior conviction of crime was admissible to impeach the defendant if he offered himself as a witness, but that the nature of the punishment for that crime was inadmissible for any purpose.

In *Godfrey v. State*[85] it was held not erroneous to permit a question to a female witness, upon cross-examination, inquiring if she did not live with *X*, a man not her husband, or he with her. The ground of admissibility as that nothing in the question tended, necessarily or probably, to impute unchastity—which would be inadmissible to impeach—, but that it did tend to show that *X* was related to defendant, that he was, therefore, interested in the case, and that he had probably consulted with the witness about her testimony. The question was admissible, then, to indicate bias, or a tendency thereto, for which it was proper impeaching evidence.

(c) Sufficiency of Evidence

In *Brooks v. Super Service, Inc.*,[86] the court rejected the doctrine that conviction of the crime is *conclusive* evidence of probable cause in a case for malicious prosecution. Saying that the evidentiary value of the conviction is the same on this issue whether the conviction was reversed or not, the court refused to commit itself between—*conclusive evidence, unless obtained by fraud, perjury or other corrupt means*—and—*prima facie evidence, rebuttable by competent evidence clearly overcoming the presumption arising from the conviction.* It was unnecessary for the court to select between these doctrines, as the declaration in the instant case was good against demurrer, on either alternative.

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[83]The writer is of the opinion that Mississippi adheres to the better, though minority, rule; but many learned writers upon the subject, including the great Wigmore [Vol. IV, §§ 2183-4], approve the contrary.

[84]189 So. 530 (Miss. 1939).

[85]187 So. 199 (Miss. 1939).

[86]185 So. 202 (Miss. 1938). (on sugg. of err.).

In *Ross v. State*[87] it was held that there was enough evidence to go to the jury in a prosecution for possessing intoxicating liquor where evidence that appellant said to the arresting officer:—"It is my liquor and if I ever get out of this I never intend to sell any more liquor."—was coupled with evidence of the finding of liquor on appellant's premises; and that the jury was not bound to believe the testimony of a co-defendant that he, alone, was guilty of the crime.

In *Walker v. State*[88] it was held that upon the issue, affecting the degree of homicide, that deceased had the defendant in lawful arrest at the time of the killing, evidence that deceased said in the presence of the defendant: "Yes, sir, this boy was stealing watermelons."—does not prove or tend to prove that the crime was committed in the presence of the deceased.

In *Anderson v. State*[89] it was said that much slighter proof of the *corpus delicti* suffices where the defendant makes a confession, than would be necessary where the state must make out its case unaided by confession. It was also said that the requirement is that the confession must be corroborated by such proof as will satisfy "the mind that it is a real and not an imaginary crime which the accused has confessed";[90] and it was held that this requirement is not satisfied, in a prosecution for aiding escape, by evidence that handcuffs were on the escaping criminal at the time when he fled and were off when he was retaken the next day.

Harris v. Pounds[91] was decided with a long and fully reasoned opinion because, as the court said, this is a case of first impression in Mississippi. Here the trial court allowed the case to go to the jury upon the issue that a given log was "too heavy for six men to carry", where the only evidence was that of witnesses who did not qualify as experts and who testified merely that it was "too" heavy. Judgment below was reversed upon the ground that it is the function of the jury to draw the ultimate inferences of fact and that it is erroneous to substitute the inferences of witnesses. The proper method would be to show the weight of the object, if that be possible; if not, to show the nature and size of the object and the unit or total weight of an object of that nature and size.[92] The conclusion as to its being "too" heavy to carry, or to carry in a certain

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[87]189 So. 526 (Miss. 1939).
[88]189 So. 804 (Miss. 1939).
[89]186 So. 836 (Miss. 1939).
[90]Quoted by the court from Heard v. State, 59 Miss. 545, 546 (1882).
[91]187 So. 890 (1939).
[92]Of course, books of reference may be used to show the unit, or the total weight, of objects of various natures and sizes. The court spoke of Scribner's Lumber and Log Book, referred to in MISS. CODE ANN. (1930 § 7358, as an example.

manner, must be left to the jury.[93] The court pointed that, otherwise, if the issue were of distance it would be enough that "a witness merely said that it was too far, if of speed that it was too great, or if of value that it was too much, or if of time that it was too long" and "this would be judicature gone wild".[94]

In *Thomas v. Williamson*[95] an illuminating definition of the position of Mississippi with respect to the "scintilla rule" was given by Griffith, J., who said that when all the evidence for a party litigant plus the undisputed facts makes a case of a "sufficiently real and substantial nature that impartial men of sound judgment could reasonable believe it, and prudently act thereon, . . . a peremptory instruction should not be granted against him." He pointed out, further, that the rejection of the scintilla rule does not mean that the rule is avoided "if there be slightly more than the least particle, or a particle more than the slightest trace" of evidence for a party.

With this statement in mind, it appears that the words of the opinion in *Ross v. State*[96] are not to be taken literally, unless it be the intention of the court to apply an anology to the scintilla rule in favor of criminal defendants. It was here held that there is reversible error where the trial court instructs the jury on murder in a case "wherein all the facts disclose that the deceased has been the aggressor, without cause or provocation, throughout the entire difficulty until the moment when the party attacked turns and slays".

It is not with regard to this language that the writer suggests the advisability of a *caveat*, but with respect to the following:[97] "The jury had the right to believe the evidence on behalf of the appellant that the unprovoked and dangerous assault by the deceased continued until almost the very moment when the appellant fired. And in determining whether such an instruction was erroneous we must consider that the stated evidence in behalf of the appellant was true."

The objection of the appellant was apparently to the giving of any instruction on murder, not to failure to give an instruction on manslaughter. If the terms of the above quoted part of the opinion are to be taken literally, it would be erroneous to give an in-

[93]If there is a claim of special disability, that fact, and its results, may be shown by experts whose peculiar knowledge may be put at the disposal of the jury.

[94]187 So. at 895.

[95]187 So. 220, 221 (Miss. 1939).

[96]188 So. 295 (Miss. 1939).

[97]*Id.* at 297.

struction in terms of malice aforethought in any case in which the defendant introduced *any* evidence, however slight or incredible, of provocation by the deceased.

An examination of the entire opinion conduces to the belief that this language is to be confined to cases wherein the evidence for the state confirms the defendant's claim of provocation. The instant case was peculiarly appealing in that the court apparently suspected that the verdict, in view of the state's own evidence, was an indication of danger that a spirit of community vengeance had found its way into the verdict. It is possible that this suspicion was considered to be fortified by the refusal of the trial court to allow the defendant to examine an eyewitness, who had not been introduced by the state, as an adverse witness.

(d) Judicial Notice

In *Haas v. Hancock County*[98] it was held that the trial court was correct in taking judicial notice of Laws of 1938, Ex. Sess., c. 134, P. 176, which authorized the Board of Supervisors of the defendant county to borrow money to pay outstanding, unpaid warrants, etc. Notice of the fact of enactment and of the terms was properly taken, because this was a "local and public act", and not a "private act".[99]

(e) View

It was held in *Gulf, M. & N. R. Co. v. Pool*[100] that it was not erroneous to refuse a view of the site of an accident where conditions thereof at the time of trial were different from those at the time of the accident.

(f) Burden of Proof

Answers to the problem of the allocation of the burden of proof were given in the following situations: (1) Where a plaintiff asserts the right to take property on attachment or execution the burden of proving his right is upon him as against the defendant's claim of exemption.[101] (2) The burden of proving facts to support the issue is upon him who pleads the statute of limitations.[102] (3) The party who asserts that he is a *bona fide* encumbrancer without notice has the burden of proof on the issue of notice.[103] That burden is not carried by proof that the party's attorney

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[98]184 So. 812 (Miss. 1938).

[99]This decision arises *a fortiori* from Feemster v. Tupelo, 121 Miss. 733, 83 So. 804 (1920), which was here cited by the court.

[100]186 So. 648 (1939).

[101]Reid v. Halpin, 188 So. 310 (Miss. 1939).

[102]Billups v. Becker's Welding & Machine Co., 189 So. 526 (1939).

[103]*Ibid.*

made a diligent inquiry and failed to acquire any notice or knowledge, because the issue is whether the *party* had notice. (4) He who alleges and relies upon the existence of a trust has the burden of proving its existence.[104] That burden is not carried by proving that the alleged trustee said that—he got the money from Holland for his father's account—and that—it was his father's money—and that—"If you wish I shall of course send you the money which is at my disposition". All this language does not show a trust because a depositary of money is likely to speak of the money deposited as the "depositor's money", and the depositor is likely to speak of it as his, even though the legal relation is clearly that of debtor and creditor, e. g. banker-depositor.

In *Seymour v. Lamb*[105] a decree for reformation of a deed of trust was reversed upon the ground that the burden, allocated to the plaintiff who asserts mistake, had not been carried by him. The court said that there was "ample evidence to show that no mistake had been made. Certainly it was not shown beyond a reasonable doubt".

There is considerable diversity of expression among the courts as to the weight of the burden of proof upon him who relies on mutual mistake for reformation of an instrument. Some courts, probably a large majority, say that they require "clear and convincing proof";[106] others, among whom is to be found the Mississippi court say that they require proof "beyond a reasonable doubt".[107] It is probable that the various methods of stating the requisite quantum of proof show a distinction without a practical difference. If a chancellor refuses reformation there is a strong influence to rely upon his estimation of the credibility of the witnesses whom he had before him, provided that substantial evidence appears in the record. If, on the other hand, the chancellor decrees reformation the influence to rely upon his finding of facts is not quite so strong because human experience has demonstrated that the existence of mutual mistake, sufficient to found reformation, is less probable than that of mutual understanding of essentials.

Inasmuch as chancellors rarely instruct themselves on the burden of proof, and rarely indicate the weight of evidence which they have required, an exact definition of the quantum of evidence necessary to support a decree for reformation is unnecessary.

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[104]Landau v. Landau, 187 So. 224 (Miss. 1939).
[105]185 So. 824 (Miss. 1939).
[106]Snipes Mountain Co. v. Benz Bros. Co., 162 Wash. 334, 298 Pac. 714 (1931).
[107]Watson v. Deven, 142 Miss. 676, 684, 103 So. 865 (1926).

It may be that Pomeroy's recognition of the lack of necessity for exactness of language caused him to say that the proof must be "most clear and convincing; . . . . the resulting proof must be established beyond a reasonable doubt".

The instant case has the appearance of a border-line case for reversal of a decree for reformation, as the court leaned heavily upon the fact that the mistake, if mistake there was, had been repeated in identical form in three deeds of trust upon the same land and between the same parties, the deeds having been made in 1916, 1920 and 1926. This evidence was taken by the court, for purposes of reversal, as tending to indicate the absence of mistake. Evidence of this nature however is, at the most, indifferent on the issue of mistake unless it be positively shown that each succeeding deed was copied from an earlier one, in which case it would not be an unreasonable inference that the original mistake, if any, was perpetuated by the copyists.

In *Edwards Hotel Co. v. Terry*[108] it was held that the *prima facie* case made by a bailor against his bailee for non-return of the thing bailed is neutralized by the bailee's evidence of loss by fire or theft, and that it then becomes necessary for the bailor to prove that the loss was due to negligence or other misconduct of the bailee. An examination of the earlier case upon which the court relied[109] discloses that the burden upon the bailee is to produce substantial or credible evidence of the cause of loss, and that the burden of proof upon the whole case never shifts from plaintiff.[110]

The type of evidence necessary to rebut the plaintiff's evidence in cases concerning illness supervening upon the discovery of a foreign substance in a bottled drink seems to be well settled in this state; but there appears to exist at least the danger of confusion between actions based on the theory of negligence and those on the theory of warranty. In the three cases which came before the Court a possible addition to the confusion appears in the opinion in *Delta Nehi Bottling Co. v. Lucas*.[111] The court spoke of "two rules of equal force as to warrantors of food or drink for human consumption . . . . (2) The negligent actor may be liable . . . .".

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[108]187 So. 521 (Miss. 1939).

[109]Yazoo & M. V. R. Co. v. Hughes, 94 Miss. 242, 47 So. 662, 22 L. R. A. (N. S.) 975 (1908).

[110]See also Alpine Forwarding Co. v. Penna. R. Co., 60 F. (2d) 734 (C. C. A. 2d, 1932); 5 WIGMORE, *op. cit. supra* n. 63, § 2508.

[111]185 So. 561 (Miss. 1939).

This seems a clear intimation that negligence is an element in the liability of a warrantor, and that the function of plaintiff's evidence of the presence of the foreign substance is to serve as the foundation for a case in which the doctrine of *res ipsa loquitur* acts as a substitute for actual evidence of negligence.

In *Biedenharn Candy Co. v. Moore*[112] it was said by Smith, C. J.,; "This evidence [that there was a foreign substance in the bottle] made a prima facie case for the appellee and shifted to the appellant the burden of giving evidence that no part of a mouse was in the bottle when delivered to the retail dealer . . . . .The jury was warranted from the evidence in believing that when the bottle was uncapped it was in the same condition that it was in when delivered by the appellant to the retailer, and that nothing got into its contents after the cap was removed, and before the appellee drank it. Consequently the jury was warranted in believing that notwithstanding the care exercised by the appellant, a part of a mouse was in the bottle when the appellant delivered it to the retailer . . . ."

This is a clear intimation that in actions on the theory of implied warranty, care on the part of the warrantor is immaterial. Thus, his only defense is to show that there was no foreign substance in the bottle when it left his hands.[113]

In *Blount v. Houston Coca Cola Co.*[114] a peremptory instruction was given for the retailer and refused to the bottler. The judgment was affirmed upon the ground that there was no showing of facts constituting negligence on the part of the retailer, nor from which negligence could be inferred, but that the doctrine, *res ipsa loquitur*, applied against the bottler. It was said that the suit was predicated upon negligence, not upon implied warranty.

In practice the confusion which was mentioned earlier will not operate in suits against bottlers, or against other manufacturers of package goods. There is, however, some danger that it will operate in cases against retailers. It is, of course, not the province of the writer to discuss, in this conection the question of

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[112]186 So. 628 (1939).

[113]This intimation, that the bottler would be relieved by proof that there was no foreign substance in the bottle when it left *his* hands, is clouded by a later part of the opinion [see 186 So. at 630.] where it is said: "What we have here, however, is a breach of the appellant's contract—an implied warranty—that the contents of the bottle were wholesome and suitable for human consumption—specifically that it did not contain a part of a dead mouse, which warranty the jury has said was broken".

This part of the opinion seems to confine the bottler to proof of accident, or intentional or negligent acts of strangers, occurring after the bottle is out of the hands of the retailer.

[114]185 So. 241 (Miss. 1939).

the existence, or the nature, of the implied warranty of the retailer of bottled drinks for human consumption. It must be assumed that these remarks are directed to cases in which it is to be decided whether a retailer does warrant the wholesomeness of the product which he sells.

The danger of confusion, in such a case, arises from language directed to the negligence of the warrantor. Warranty of wholesomeness has no connection with failure to use due care: the warrantor is liable if he has used all possible care.[115] It is entirely possible that the doctrine, *res ipsa loquitur*, is not applicable to the retailer; but that the interest of the state in welfare of its citizens demands that the retailer be held a warantor of the wholesomeness of bottled drinks supplied for human consumption. That result has been reached in Massachusetts in two cases decided on the same day by the Supreme Judicial Court—two cases which are indistinguishable on the facts.[116]

(g) Presumptions

Determination of the weight of evidence necessary to overcome various presumptions was made in three cases. In the two cases, first to be discussed, evidence to repel the presumption of innocence, in a case of alleged bigamous marriage, was in issue, in the third case evidence to repel the presumption of sanity in a case of alleged murder.

In *Bourland v. Hatchcock*[117] the court used language which may indicate a relaxation of the quantum of proof necessary to show the invalidity of a second marriage, in civil cases, as against the presumption of innocence. In this type of case the presumption of innocence is relied upon by one party to take the place of evidence that an alleged spouse was divorced from a prior spouse. It was said:—

> "No burden rested on the complainants to prove that Dorothy [the first wife of the twice marrying husband] *could not* have obtained a divorce at a place other than Shelby County, Tennessee, *but only that it was reasonably certain that she did not do so.*"[118]

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[115]Ward v. Great A. & P. Tea Co., 231 Mass 90, 120 N. E. 225, 5 A. L. R. 242 (1918); Randall v. Newson, 2 Q. B. D. 102 (C. A. 1879).

[116]Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100 (1918) (pebble in baked beans served to customer—liable on warranty) [This case is commented upon in (1918) 4 CORN. L. Q. 74; (1918) 32 HARV. L. REV. 71; (1918) 17 MICH. L. REV. 261; (1919) 28 YALE L. J. 294]; Ash v. Friend Dining Hall Co., 231 Mass. 86, 120 N. E. 396 (1918) (small tack in blueberry pie served to customer—*res ipsa loquitur* inapplicable).

[117]188 So. 9 (Miss. 1939).

[118]*Id., per* Smith, C. J., at 11. (Italics supplied by this writer.

In an earlier case the court had held that it was reversibly erroneous to instruct a jury that it was bound to presume a divorce from the prior spouse "unless it has been conclusively proved by positive evidence that no divorce had been granted before the second marriage". The ground for reversal was said to be that the presumption of innocence is not conclusive, but is "capable" of being overcome by *such testimony as satisfies the mind of the jury*", and that "an alleged valid marriage is not to be declared invalid except upon the *clearest and strongest proof*", and that proof sufficient "to produce *conviction in an unprejudiced mind*" is as high a degree of proof as the law requires.[119] In another case it was said that the party attacking the validity of the second marriage had proved, "as clearly as a negative can ever be shown", that there had been no divorce from the first marriage.[120]

Too great weight must not be placed upon the language used by Smith, C. J., in the instant case, because all the evidence tending to prove that Dorothy could have gotten a divorce, elsewhere than in Shelby County, Tennessee, fell far short of showing that she could have acquired a domicile elsewhere.

It is to be noted that the burden of proof of prior divorce is governed by a very different rule in cases of prosecutions for bigamy. The rule is clearly stated and ably justified in the opinion of Mayes, C. J., in *Bennett v. State*.[121] It was said that the State has carried its burden when it shows the former marriage and the continued life of the former spouse;[122] and held that the burden of proving dissolution of the former marriage was upon the defendant.

In the second case to be discussed, *White v. State*,[123] a conviction for bigamy was reversed upon the ground that the presumption of innocence at least neutralized the presumption of the first wife's continued life, and that this neutralization threw upon the State the burden of proving that she was alive at the time of the second marriage. The court said: "The State having thus failed to prove such a vital and constituent element of the corpus delicti [appellant was entitled to the peremptory instructions which he asked at the trial]."

In *Bennett v. State* the burden was placed upon the defendant through analysis of the statutes defining the crime of

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[119]Colored K. of P. v. Tucker, 92 Miss. 501, 507, 508, 46 So. 51 (1908) (Italics supplied throughout by this writer).
[120]Sullivan v. Grand Lodge, K. of P., 97 Miss. 218, 224, 52 So. 360 (1910).
[121]100 Miss. 684, 698-704 (1911) (on suggestion of error).
[122]*Id.* at 694.
[123]184 So. 303 (Miss. 1938).

bigamy. It was there noted that the Code contains two sections, one of which defines the crime and sets the penalty,[124] the other expressing "exceptions".[125]

It is submitted that the last three "exceptions" in the statute are not exceptions at all, but are definitions of the words "husband or wife" in the preceding section of the Code. If the persons guilty of bigamy are defined in terms of "every person having a husband or wife living", is *"living"* part of the corpus delicti and *"husband or wife"* not part thereof? No husband and wife relationship exists when the marriage has been "dissolved", "pronounced void" or "annulled".

Are these two cases not demonstrations of the tortuous reasoning necessary when an attempt is made to weigh one presumption against another? Is it not true that the factual probability supporting the presumption of continued life, upon which the prosecution cannot rest, is as strong as the factual probability supporting the presumption of continued existence of a once existent status of marriage, upon which the prosecution can rest?

The argument is that the employment of the language of the weight of presumptions conceals the following process: The burden of proving the guilt of a criminal defendant rests always upon the State, and this burden can be carried only by proof beyond a reasonable doubt. In certain situations evidence of the facts necessary to establish a positive or negative proposition is so much more available to the defendant than to the prosecution that it is not unjust to impose upon the former the burden of producing evidence to support the proposition, and among these situations is that in which a person has once been married and claims to be divorced. It is probable that a married person will know whether there is any factual basis for a claim that he is divorced. In other situations evidence of the supporting facts is as available to the prosecution as it is to the defendant. In such situations no valid reason for shifting the burden of producing evidence to the defendant is perceived. Evidence of the fact that a former spouse is still alive must, in almost all, if not all, cases be as available to the prosecution as to the defendant.

This discussion is, as a practical matter, not directed to the particular presumptions here involved. we have decisions establishing the comparative weight of the presumptions of innocence,

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[124]Now MISS. CODE ANN. (1930) § 795.

[125]Now § 796, *id.* These are:—(1) Spouse absent for seven years and existence of spouse during that period unknown to defendant; (2) Expatriation of spouse for seven years; (3) Absolute divorce, provided that decree does not forbid remarriage; (4) Declaration of nullity; (5) Annulment.

continued life and continued marriage. It now makes little difference what the intellectual process in weighing these presumptions may have been. What, however, is the weight of the presumption of love of life, of the presumption that a person will act as he is required to act by the non-criminal law, and of the presumption of survivorship?

The weight of the presumption of sanity in criminal prosecutions is indicated in *Waycaster v. State.*[126] It was there said that criminal prosecutions start with the presumption that the defendant is sane,[127] but that the presumption disappears as soon as there is introduced evidence of insanity which, though "not sufficient to raise a reasonable doubt in the mind of the trial court . . . . would be reasonably calculated to raise such a doubt in the mind of any of the jurors"; and that the burden of proving sanity beyond a reasonable doubt is then thrown upon the State.

It has been pointed out that there are two competing doctrines with respect to the presumption of sanity, the so-called *English rule,* which is adhered to by several of our States, and the so-called *American rule.* The former requires the defendant to prove his insanity,[128] and the latter throws the burden upon the State, as exemplified in the instant case. Attempted doctrinary justification of either rule is impossible. Those courts which adhere to the English rule do so upon the ground that the defense of insanity is by way of confession and avoidance, and analogize to the defenses of self defense or license. Those which follow the American rule do so upon the ground that criminal intent, malice and premeditation are essential elements of the crime of murder, and that these cannot exist in an insane mind. It appears that the selection of one or the other of these techniques depends upon the choice between refusal to relax the protection given by the law to potential victims with its consequent occasional execution of an innocent man, and insistence upon the theory that it is better that ninety murderers go unpunished than that a single innocent man be punished.

It is not the province of this writer at this time to express any choice between these theories, but it is his duty to point out that these opposed rules derive verbally from different weights

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[126]187 So. 206 (Miss. 1939).

[127]Compare, however:—"Sanity is a pre-existing fact which may be taken for granted as implied by law and general experience. We do not infer sanity from the criminal act, as we do malice and premeditation. Sanity is a premise, not a conclusion." *Per* Douglas, J., in State v. Quigley, 26 R. I. 263, 58 Atl. 905, 67 L. R. A. 322, 3 Ann. Cas. 920 (1924).

[128]McNaghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

given to the presumption of sanity, and that there is danger of losing sight of the underlying problem if an attempt is made to weigh presumptions against each other.

It seems clear that the function of the presumption of insanity in Mississippi is to control the trial judge so that he will instruct the jury on the issue of insanity in all cases when a reasonable juror might have a reasonable doubt of the defendant's sanity, and will not refuse merely because *he* has no such doubt.

C. PLEADING, PRACTICE AND PROCEDURE

(a) Pleading Damages

In *Curry & Turner Construction Co. v. Bryan*[129] it was held that in a tort case the defendant's remedy, if any, with respect to particular items of damages, *e. g.* doctor's bills and hospital expenses, is not to object to evidence on the subjects but to move for a bill of particulars under § 555, Code of 1930.[130]

In *Jackson v. Leggett*[131] there was an allegation that:—defendant struck plaintiff willfully and unlawfully . . . .; and accompanied said willful and wanton conduct with vile and opprobrious epithets. It was held that the second clause comprises an allegation of aggravation of the assault and battery, and that recovery might be had even though the language was uproven.

(b) Pleading Estoppel

In *Hartsfield v. Lafayette County*[132] it was held that estoppel may be raised only by plea, not by demurrer.

(c) Aider by Reference to Earlier Allegations

In *Conroy v. Breland*[133] there were the following allegations in an action for libel:—

—That furniture and fixtures in plaintiff's store had been loaned to her by various friends;

That she had made a deed of trust to defendant which did not include the furniture and fixtures;

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[129]185 So. 256 (Miss. 1939).
[130]Accord as to lack of necessity for pleading items of damages, Missouri-Pacific Trans. Co. v. Neal, 105 F. (2d) 625 (C. C. A. 8th, 1939).
[131]189 So. 180 (Miss. 1939).
[132]189 So. 177 (Miss. 1939).
[133]189 So. 814 (Miss. 1939).

That defendant, knowing that plaintiff had no mortgagable interest therein, had inserted the furniture and fixtures in the deed of trust;

That defendant demanded said furniture and fixtures of said friends, claiming to have a deed of trust thereon duly executed by plaintiff.—

In a separate paragraph there was the following allegation:—

—That defendant wrote to each of said parties from whom the plaintiff borrowed the said property a letter demanding possession of said property, claiming at the time that the defendant held a deed of trust against the same.—

A judgment for defendant on demurrer was reversed and the case remanded upon the ground that the absence of an express allegation that defendant charged in writing, that *plaintiff* had executed the deed of trust, was not fatal. The allegation with respect to the writing was to be taken in connection with the earlier allegations, and, even if the earlier charge was made orally by the defendant it operated to make the recipients of the writings reasonably believe that the person referred to as the maker of the deed of trust was the plaintiff.

The decision in this case was bottomed upon the Restatement of Torts, wherein it is said that "extrinsic facts may make it clear that a statement refers to a particular individual although the language appears to defame nobody".[134]

(d) Incorporation of Pleadings in Other Suits

On plaintiff's petition for mandamus defendant pleaded the pendency of a former suit in chancery. It was held, in *Abiaca Drainage District v. Albert Theis & Sons*,[135] that, under these circumstances, the facts well pleaded in the bill in chancery must be taken as true.

(e) Amendments

In *Smith v. Smith*[136] one of two witnesses to a will testified in chief that he was not aware of the nature of the instrument at the time when he subscribed thereto. The proponents did not cross-examine but did examine this witness directly near the end of the trial. After all the evidence was in, the contestant moved to amend his pleadings in order to make them conform to the proof. The

[134]RESTATEMENT OF TORTS (1934) § 564.
[135]187 So. 200 (Miss. 1939).
[136]188 So. 305 (Miss. 1939).

trial court refused to allow the amendment, except upon terms of giving additional time to the proponents in which to answer the petition as amended.

It was held that the imposition of the condition of the allowance of further time to answer the petition was error. The motion to amend should have been allowed without condition.

This was undoubtedly the correct decision as it seems evident that the proponents were not surprised. They offered evidence tending to prove that the witness had been told the nature of the instrument, and it appeared that all witnesses who could have testified upon the issue had done so as if the issue had been in the case. Inasmuch as it appears that the contestant withdrew his motion to amend, it is a little difficult to understand how this was one of the errors for which the judgment was reversed, even though the court said:—"It is necessary that we reverse and remand the case because of the error in disallowing the amendment without the terms imposed, and because of other errors hereinafter mentioned."[137]

(f) Instructions to the Jury

In the same case, *Smith v. Smith*, it was indicated that care must be taken not to give instructions in cases of contests of wills which may be misleading in that they tend to cause the jury to believe that the issue is insanity of the testator, because the jury may reach a wrong decision upholding the will, as some of the jurors may believe that the testator was incompetent to make a will, though not insane.[138]

In *Graves v. Hamilton*[139] the Court reiterated its caution againt the use of excerpts from judicial opinions in the drawing of instructions to juries. It was pointed out that the danger inherent in this practice arises from the fact that language which is understandable to those who are versed in the legal cant, may be obscure or deceptive to laymen.

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[137]*Id.* at 307. The other errors were:—(1) Failure to determine the competency at a preliminary hearing in the absence of the jury [See the same case at note 69, *supra*]; (2) Misleading instructions on the issue of testamentary capacity [See the same case immediately *infra*, at note 138].

[138]It may be inferred that this was one of the errors mentioned in note 161, *supra*, even though the court said that the instructions were correct as a whole.

[139]184 So. 56 (Miss. 1938).

(g) Refusal to Allow Examination of Witness as an Adverse Witness

In *Smith v. Smith*[140] it was held proper to refuse to allow the contestant to offer an alleged witness to a will as an adverse witness.

The same result was reached in *Ross v. State*[141] with respect to the claim of the defendant in a prosecution for murder to introduce and examine as an adverse witness an eye-witness to the homicide, who was not offered by the State. It was said, citing many Mississippi cases, that this doctrine derives from the abrogation in this State of the ancient common law rule requiring the prosecution to introduce all eye-witnesses.

(h) Parties

In *Warren v. Sidney's Estate*,[142] a case of first impression in Mississippi, it was held that the public escheator may sue, for the State, to contest the probate of a will.

In *Townsend v. Beavers*[143] the court construed § 1694, Code of 1930, which provides that "all parties interested shall be cited by summons or publication" when a petition to sell the land of a deceased person is filed. It was held that "the parties interested" include heirs, and devisees, or their conventional vendees, mortgagees or assignees, or those whose interests have become the vested equivalents of those of vendees, mortgagees or assignees; and that judgment creditors of the heirs or devisees are not, as such, members of one of those classes.

(i) Additional Time to Prepare Bill of Exceptions

It is provided in § 729, Code of 1930, that the appellant shall be allowed an additional sixty days to prepare his bill of exceptions if the court reporter die or be unable or fail to transcribe his notes. In *Mississippi State Highway Dept. v. Meador*[144] it was held that the allowance of a second additional sixty days is void and that a bill of exceptions prepared under such an allowance will be stricken. It was further held that § 728, Code of 1930, which expressly protects copies of the transcript even though a copy be not furnished within the sixty days allowed by § 729, was not applicable because the bill of exceptions is not the transcript.

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[140]188 So. 305 (Miss. 1939).
[141]188 So. 295 (Miss. 1939).
[142]184 So. 806 (Miss. 1938).
[143]188 So. 1 (Miss. 1939).
[144]185 So. 816 (Miss. 1939).

(j) New Trial for Newly Discovered Facts

In *Hudson v. State*[145] the court reiterated the rule, established by a long line of Mississippi cases which were cited in the opinion, that on a motion for a new trial for newly discovered facts, both the party and his attorneys must make affidavit or testify under oath that they did not know of the facts during the trial; and, in the absence of such affidavits or testimony, the court will not consider an assignment of error predicated upon refusal to grant a new trial.

(k) Appeal Bond as Application for Appeal

An appellant filed an appeal bond in Circuit Court, but no application for an appeal appeared on the record. The Circuit Court dismissed the appeal on the ground that no application for appeal under § 704, Code of 1930, had been made. In *Schwartz v. McKay*[146] the Court reversed this judgment upon the following grounds:—(1) § 704 requires no written application for appeal, and the spirit, if not the letter, of § 26, Code of 1930,[147] should control; (2) In the absence of record evidence to the contrary the Supreme Court "must presume that the bond was tendered with a request" for its approval for the purposes of appeal; and: "The tender of the bond was in fact such a request."

(l) Argument of Prosecuting Attorney

In *Hartfield v. State*[148] an extremely interesting limitation upon the right of a prosecuting attorney to comment upon evidence actually admitted without objection was involved.

This was a case of prosecution for homicide, in which the defendant was, at the time of the killing, serving a life sentence in the penitentiary for another homicide. Various prison officials were introduced by the defendants as character witnesses. On cross-examination these witnesses testified, without objection by the defendant, that their only acquaintance with him was as a prisoner serving a life sentence.

In his argument the prosecuting attorney said:

> "Now gentlemen, we come to the question of punishment. You should not bring in a verdict of manslaughter or a life sentence. What is the use of sending a man to the

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[145]188 So. 561 (Miss. 1939).
[146]185 So. 811 (Miss. 1939).
[147]Dispensing with the necessity for a "petition" for appeal to the Supreme Court.
[148]189 So. 530 (Miss. 1939).

> penitentiary for life, because he is already there under a life sentence, and anything less than the death penalty would not be a punishment in this case."

Upon objection by the defendant to this line of argument, the judge said, in the hearing of the jury:—

> "In view of the fact that the jurors have two matters to decide, one the guilt or innocence of the defendant and the other the nature of the punishment, I do not think the argument is outside the proprieties."

and allowed the argument to proceed along this line, refusing a request for a mistrial.

Upon appeal the conviction and sentence for murder were reversed and the case remanded.

Speaking for the majority of the court, McGehee, J., said:—

> "To say that a man should be punished only by death, even though the jury should honestly believe that under the evidence a verdict of manslaughter should be returned . . . is equivalent to asking the jury to disregard the legal rights of the accused which entitled him to have the grade of the offense determined by the facts alone of the particular crime for which he was then on trial, without regard to whether he was then serving a life sentence. That question had nothing to do with the issue of whether the verdict should be murder or manslaughter."

It was the opinion of the minority, speaking through Ethridge, J.,[149] that the admission of the evidence of the fact that defendant was serving a life sentence, defendant not objecting, made that evidence "subject to comment, and to such use in the case as its logical and legal value indicated". The dissenting opinion cited *Jacobs v. State*,[150] in which the prosecuting attorney remarked that he was becoming wedded to capital punishment and that he was getting tired of penitentiaries, as a man sent there for life will soon be pardoned, and a dead man cannot be pardoned.[151] An

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[149]McGowen, J., concurring in dissent.

[150]103 Miss. 622, 60 So. 733 (1912).

[151]It is interesting to note that Judge Ethridge, then arguing as assistant attorney-general, maintained that the prosecuting attorney was "evidently arguing a moral proposition, and did not undertake to state the law." [See 103 Miss. at 626] See also his opinion in Nelms & Blum Co. v. Fink, 159 Miss. 372, 382-383, 181 So. 817 (1930) where he said:—"[Counsel's] function is to draw conclusions and inferences from the evidence on behalf of his client in whatever way he deems proper, so long as he does not become abusive and go outside the confines of the record . . .; there is nothing to authorize the court to interfere until there is either abuse, unjustified denunciation, or a statement of fact not shown in the evidence". (This opinion was quoted in the instant opinion, 189 So. at 544.)

earlier case, *Gray v. State*,[152] was also cited in support. In this case the prosecuting attorney said that: "he called upon the jury to put a stop to these homicides, and that there had been three or four in his neighborhood within the last three months". In the earlier case there was a prosecution for manslaughter, and in the later case, no evidence of manslaughter—in neither is there any indication that the jury were asked to choose between two different crimes.

Consideration of the different emphasis placed upon various facts appearing in evidence by McGehee and Ethridge, JJ., makes it seem at least possible that the difference in attitude toward the argument in the principal case was caused by a feeling on the part of the majority that the verdict of murder was caused by the argument. The dissentients, on the other hand, seem to have felt that the jury *could* have brought in a verdict of manslaughter, but *should not* have done so.[153]

It is possible that this conviction and sentence would have been affirmed if the trial judge had carefully instructed the jury that the argument could be considered only upon the question of punishment.[154] This result would not conflict with any of the cases cited in either opinion, and would harmonize with the negative pregnant in *Springer v. State*,[155] where it was said that it was improper for an attorney to comment on the possible punishments when the jury has nothing to do with fixing the punishment.[156] It would harmonize also with *Jacobs v. State*, wherein it appears that only punishment was in issue, and with *Windham v. State*[157] in which the remarks of the prosecuting attorney with regard to the discretion of the judge as to the punishment for manslaughter were said to be "a plain bid for a conviction of manslaughter, under the indictment for murder," in a case in which it appeared "very doubtful" whether the shot fired by the defendant was that which killed the deceased.[158]

D. PROCESS

(a) Waiver of Process

In *Townsend v. Beavers*[159] it was said that waiver of process written on the bottom of the petition and acknowledged before the

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[152]90 Miss. 235, 43 So. 289 (1907).

[153]It was said in the dissenting opinion that "There was an abundance of proof upon every proposition involved, measured by the law, to sustain a conviction of murder".

[154]See 189 So. at 532; *but see id.* at 533.

[155]129 Miss. 589, 597-598, 92 So. 638 (1922).

[156]The opinion in this case was delivered by Ethridge, J.

[157]91 Miss. 845, 45 So. 861 (1907). It is to be noted that this case and Springer v. State were cited by the majority in the instant case.

[158]There were other reversible errors, but it appears that this alone would have been enough for reversal.

[159]188 So. 1 (Miss. 1939).

clerk of the court in which the suit is filed is without question valid, and held that it makes no difference, under Laws of 1936, c. 244, that a waiver, properly filed in the cause and properly identifying itself with the court, the matter and the particular petition, is written on a separate piece of paper, provided that it be acknowledged before the clerk or a notary public.

This decision is a sensible extension of *Byrne v. Jeffries*,[160] holding valid a waiver, attested by the clerk of court, written on the declaration. This case and the instant case are not to be confused with *Industrial Investment Corp. v. Standard Life Ins. Co.*,[161] where the waiver of process was not attested. It appears that the important consideration is assurance of the genuineness of the waiver, not the form.

(b) Doing Business within the State

In *C. I. T. Corp. v. Stuart*[162] it appeared that plaintiff, a foreign corporation, was sending agents into the state to solicit the sale of conditional sale contracts and other financial paper; that the contracts and other paper were not accepted by the soliciting agents; but that they were accepted and the purchase completed in another state; and that the corporation had not appointed an agent within the state upon whom service of process could be made. It was held that a foreign corporation so operating could sue in the state courts, since it was not doing business within the state within the meaning of § 4140, Code of 1930.

The determination of the fact that a foreign corporation is "doing business" in a state may be governed by economic realities or by the nice refinements of the law of agency or of contracts.[163] It is, perhaps, difficult to determine upon which of these considerations the Restatement of Conflict of Laws bottoms its doctrines. Examination of three of its illustrations may indicate the position of its learned proponents. They read as follows:—

> (a) A is incorporated in state X to deal in securities taken by automobile dealers upon cars sold by such dealers. A establishes a branch office in the state Y, there solicits business, investigates the financial standing of

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[160]38 Miss. 533 (1860).

[161]170 Miss. 139, 149 So. 883 (1934) (commented upon in (1934) 6 Miss. L. J. 303.

[162]187 So. 204 (Miss. 1939).

[163]The decision in the famous case of Old Wayne Mut. L. Ins. Co. v. McDonough, 204 U. S. 8, (1906), appears to depend upon the latter consideration.

customers, and pays for securities purchased, the branch office then forwarding them to the home office. A is doing business in Y.[164]

(b) Under the facts of Illustration 9 [(a) *supra*], the branch of the A corporation in state Y receives securities from the dealers in state Z. It examines the credit of the dealer in Z, and usually discounts the securities, although under no contract to do so. A does not solicit business in Z. It is not doing business in Z.[165]

(c) C, a corporation of State X, sends selling agents into State Y who solicit and obtain orders for the purchase of goods. The orders are sent to C in X; C ships the goods to the purchasers in Y. No statute in Y can restrict or prohibit the business so conducted.[166]

If illustrations (a) and (b) are compared it is impossible to determine whether the essential difference is caused by the fact that contracts were made in Y in the former, and no contracts were made in Z in the latter; or whether the essential difference is that there was solicitation in Y in the former, and none in Z in the latter. Illustration (c) appears to solve the problem. It is an illustration to Comment b, §169 of the Restatement which states:—"No such statutes [statutes imposing terms upon the doing of business by foreign corporations within a State] can constitutionally interfere with the carrying on of interstate or foreign commerce in any State of the United States by a foreign corporation."

Consideration of the position of this illustration compels the conclusion that C is to be deemed "doing business" in Y. The nice refinements of the law of contracts and of sales would lead to an opposite result. The contracts were made in X by shipment of the goods and the goods presumably went into Y as the property of the purchasers.[167] Only the solicitation and the obtaining of orders in Y are left to be deemed the doing of business in Y. Yet the

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[164]RESTATEMENT OF CONFLICT OF LAWS (1934) § 167, comment *c.*, Illustration 9.

[165]*Id.* Illustration 10.

[166]*Id.* § 169, comment *b*, Illustration 1. It is to be noted that the word "state" in the Restatement indicates any independent juristic unit, while "State" (capitalized) indicates a State of the United States.

[167]UNIFORM SALES ACT, §§ 18, 19; SALE OF GOODS ACT (56 & 57 VICT., c. 71) § 18.

implication is plain that, but for the Interstate Commerce Clause of the Federal Constitution, Y could impose terms upon the activities of C in Y.[168]

It appears, thus, that our court has to this extent refused to follow the Restatement.[169]

E. VENUE

(a) Fraudulent Joinder of Defendants as Joint Tort Feasors

In *Weems v. Lee*[170] plaintiff joined, as defendants in an action for a negligent tort, a town in the county in which the venue was laid and a person who resided in another county. The nonresident defendant moved for change of venue and, the motion being denied and a directed verdict rendered for the co-defendant town, renewed his motion. It was again denied. On appeal the court held that the denial of the motion was correct. It was said that a motion for a change of venue should be granted where the resident defendant is, as a matter of law, not liable and his non-liability has been decided by the Supreme Court. In such a case the joinder of the resident defendant would be a fraudulent attempt to deprive the non-resident of his rights under §495, Code of 1930, the fraud being dependent upon plaintiff's knowledge that no recovery could be had against the resident defendant.

In a case like the instant case, however, where the Supreme Court has not ruled upon the liability of a town for negligence under the particular circumstances, the refusal of the motion and of its renewal was proper.

(b) Divorce

In *Lamar v. Houston*[171] the appeal was from the action of the trial court in sustaining respondent's demurrer to a bill of divorce. The bill made as an exhibit a certified copy of divorce proceedings

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[168]See RESTATEMENT OF CONFLICT OF LAWS (1934) § 169:—"Except as limited by the Constitution of the United States, a State can impose any terms upon a foreign corporation doing business within the State."—See also comment *b*, to this section, in the text, *supra*.

[169]North Am. Mtge. Co. v. Hudson, 176 Miss. 266, 168 So. 79 (1936) (cited by the court, 187 So. at 205), does not seem to be binding authority. It there appears that the most that was done in Mississippi was the casual purchase of mortgages therein, and it is even doubtful that the purchases were made in the state. See 176 Miss. at 267, 271.

The decision in C. I. T. Corporation v. Stuart was not made under compulsion of the Commerce Clause as no interstate commerce was involved. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (1869); Nathon v. Louisiana, 8 How. 73, 126 L. ed. 992 (1850).

[170]187 So. 530 (Miss. 1939).

[171]184 So. 293 (Miss. 1938).

and a decree in favor of respondent against the present complainant. This exhibit disclosed that respondent had alleged, and that it had been in effect adjudicated, that the separation between the parties had taken place in Quitman County, where the suit was brought. The bill in this suit sought to impeach the former divorce upon the ground that respondent in this case, complainant in the former, had perpetrated a fraud upon the court of Quitman County. This fraud consisted in alleging that the separation took place in that county when, in fact, it took place in Webster County. The decree in the former suit was given in 1936 after personal service upon the respondent in that suit.

On appeal the court affirmed the judgment sustaining the demurrer. The court refused to affirm upon the ground that the recitals of jurisdictional facts in the earlier decree imported absolute verity, and inferentially, upon the ground relied upon in *Hester v. Hester*,[172] that collateral attack upon divorce is against public policy, and bottomed its decision upon laches of this complainant. It apparently took judicial notice that the respondent had remarried, deriving its knowledge from the fact that she was sued "as Gertrude Bonner (Mrs. Fred) Houston."

The court cited, and paraphrased with approval certain language used in *Hester v. Hester* to the effect that— setting aside of the divorce obtained by the appellee would render her second marriage and her living with her second husband illegal. . . . . and would render illegitimate the children, if any, born of the second marriage—. The court continued:—"It would also be unjust and inequitable to thus stigmatize the little girls born of the first marriage by having it now decreed that the divorce obtained by their mother was illegal, and that her living with Fred Houston was adulterous."

It is submitted that refusing a divorce to complainants in this type of case upon the ground of laches or estoppel is not in accord with public policy. Refusing to allow a collateral attack by the party who obtains an invalid divorce; or by a party who, relying upon such a divorce, remarries; or who, by failure to object to the invalid divorce, is at least partly a cause of the other spouse's remarriage, is good policy, when the attack is made for the purpose of obtaining a share of the spouse's property upon the ground that the "dissolved" marriage still exists.

It is to be noted, however, that the court did not purport to declare that the divorce was valid. If this decision means that no person can collaterally attack the divorce, the result is the same as

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[172]103 Miss. 13, 60 So. 6, Ann. Cas. 1915B, 428 (1912).

if the divorce were valid and the parties will have been allowed to confer jurisdiction in a local action,[173] and this can not be done under the law of this State.[174]

If this decision is not to be taken to indicate that a divorce decreed under these circumstances is subject to no attack, it seems clear that the parties are married forever and that it will be impossible for the wife to regularize her status until the husband dies.[175] Even though the husband is affected by laches or estoppel there are other parties who could not make a direct attack upon the divorce and who would not be barred from collateral attack by either of those doctrines.[176]

F. REMEDIES

(a) *Ne Exeat Republica.*

In *Muckelrath v. Chezem*[177] the defendant in a divorce suit violated the condition of a *ne exeat* bond. Divorce and alimony were decreed to the complainant and the court added a decree ordering the obligor and his sureties to pay the alimony to the complainant up to the amount of the bond. On appeal this decree was reversed and remanded with directions to make a summary order that the obligor pay the money into court or show cause why he should not do so, and, if and when payment is made into court, to order disbursement to the successful complainant as the court may direct.

In reaching this decision the court held that a *ne exeat* bond in a divorce case is for the benefit of the complainant; that the obligor and his sureties, by making the bond, entered an appearance in the suit for the purpose of jurisdiction and thus became parties thereto with respect to the use of the bond for the purposes of the suit; that the court has power to make summary orders to enforce such bonds; and that neither a formal money decree nor independent judgment at law is necessary or proper.

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[173]"But the one proposition above all others, which Haddock v. Haddock, [201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867, 5 Ann. Cas. 1 (1906)] is authority for is that a right of action for divorce is not a transitory action". *Per* O'Niell, C. J., in Voorhies v. Voorhies, 184 La. 406, 422, 166 So. 121, 126 (1936).

[174]Wilkerson v. Jenkins, 77 Miss. 603 (1900).

[175]This consideration impelled the Supreme Court of New York to grant a divorce to a husband who had obtained a "void" Mexican divorce. Shannon v. Shannon, 286 N. Y. Supp. 27 (1936).

[176]The implications of this decision will be discussed in a comment to appear in an early issue.

[177]186 So. 620 (Miss. 1939).

While the writ of *ne exeat republica* has been abolished in many states by statute,[178] it still exists in some states which recognize its great usefulness in cases for divorce and alimony. Among these latter there is considerable disagreement as to its availability before the making of the decree for alimony and the consequent ascertainment of the measure of the defendant's liability.[179] Chancellor Kent found no danger in the issuance of the writ before the amount of the demand for alimony was made certain by decree, because the writ issues only in discretion and the chancellors can be trusted to take care that it be not used for oppression or extortion, and felt that in cases like the instant case the availability of the writ is essential for the administration of justice.

The taking of a bond conditioned on awaiting the decree in a divorce action, like that in this case, seems of no particular use because effective personal service of the petition for divorce can be made upon a defendant who can be caught for arrest under the *ne exeat,* and the subsequent decree for alimony will be valid *in personam* and entitled to extra-territorial enforcement. If such a *ne exeat* bond is taken the defendant can skip out of the state immediately after the rendering of the decree for alimony, unless a new *ne exeat* bond conditioned on performance of the decree be obtained, and the matter may develop into a race between the defendant and the petitioner's attorneys.

It seems advisable, then, to take advantage of our court's apparent adherence to the American rule, which will permit the requirement of a *ne exeat* bond conditioned on the performance of a decree for alimony which may be made. In that way justice may be administered through orderly procedure, without a scramble for the second writ.

(b) *Quo Warranto.*

In *Omar v. West*[180] it was held: First, that a contestant who relies upon the illegality of the purported election of his opponent, not upon his own election, has only *quo warranto* under Section 3053, 3054, Code of 1930; Second, that an election contest brought under Section 6258, Code of 1930 cannot be treated as an information in the nature of *quo warranto,* because it is not brought as required by statute, in the name of the State by the attorney general or a district attorney, nor *"ex rel."*

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[178]See Ford, *Imprisonment for Debt* (1926) 25 MICH. L. REV. 24; Note (1928) 41 HARV. L. REV. 786; 19 R. C. L. 1340 ff.

[179]It is clear that, unless forbidden by statute or constitution, *ne exeat* may issue in a proper case after decree for alimony. See Note 8 A. L. R. 330-332.

[180]188 So. 917 (Miss. 1939).

(c) *Habeas Corpus.*

In *White v. State*[181] the facts were that a circuit judge imposed a deferred sentence of imprisonment in vacation and the appellant brought *habeas corpus.* The court said that a party must rely upon *appeal* for mere reversible errors, but that *habeas corpus* is a proper remedy for imprisonment where the defect is fatal and incurable. The imposition of deferred sentence in vacation by a circuit judge is such a defect, as circuit judges derive all powers in vacation from statute[182] and no such power is given by Sections 579, 1299, Code of 1930, while Section 1300 applies to suspended, as distinguished from deferred, sentences.

Relief by way of *habeas corpus* is probably available in the situation found in *Reynolds v. State*[183] if the revocation of the suspension of a sentence is without proper notice and hearing.

(d) Taxpayer's Suits.

In *Mississippi Road Supply Co. v. Hester*[184] it was held that suit by a taxpayer, as such, to obtain relief on behalf of the public is authorized only where the plaintiff invites all taxpayers or the members of the public to join in the suit,[185] that, as a condition precedent to the right to bring such a suit, the taxpayer must present to the public officers, who could sue, sufficient facts to convince the legal mind that the institution of suit is warranted; and that taxpayers are authorized by law to bring suit only in cases where the funds for the contract involved are not authorized by law.

The latter two limitations exist because (1) notoriety of the facts is not the equivalent of knowledge in the competent officials, (2) small irregularities may not justify a suit, and (3) suit rarely lies where money is appropriated for a public purpose and contracts are made, but there is a failure to comply with the formalities required by statute.

(e) Eminent Domain.

If eminent domain proceedings are brought in county court under § 696, Code of 1930, the parties are entitled to the procedure there prescribed, and the giving of the statutory instruction prescribed by § 1491 for justices of the peace sitting in a special

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[181]188 So. 8 (Miss. 1939).

[182]Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582 (1920).

[183]187 So. 528 (Miss. 1939). This case is stated, *supra,* p. 54 at n. 20.

[184]188 So. 281 (Miss. 1939).

[185]This, as stated in McKee v. Hogan, 145 Miss. 747, 110 So. 775 (1926), is to avoid a mass of individual suits through the application of the maxim, *interest rei publicae ut sit finis litium.* See Baird v. Georgia Pac. R. Co., 12 So. 547, 548 (Miss. 1893).

court of eminent domain[186] and the refusal of an appropriate instruction on the whole case is error. On such error, the circuit court on appeal must grant a trial de novo under § 704.[187]

(f) Prohibition.

Appellant petitioned in circuit court for a writ of prohibition against Easterling, J. P., Dist. No. 5 of Jones County, the members of the Board of Supervisors of that county and the sheriff thereof to prevent the enforcement of an ordinance or order forbidding the sale of beer and wine within 1,500 feet of any school or church in the unincorporated village of Moselle in that county. In passing this order the Board of Supervisors purported to act under statutory authority to fix zones and territories, to promote public health, morals and safety,[188] and to designate territories surrounding churches and schools, outside of municipalities, in which the sale of wine and beer should be forbidden.[189]

The Circuit Court sustained the demurrers of the sheriff and the Board of Supervisors and denied the writ against the justice of the peace. In *Ford v. Easterling*[190] there was affirmance by an evenly divided court.

The entire court agreed that prohibition will issue to prevent vexatious prosecutions under a void ordinance, but not for prosecutions under a valid ordinance.

It was the opinion of Ethridge, J., who spoke for the majority, Smith, C. J., and McGowen, J., that the ordinance was valid as reasonable. Notice was taken of the fact that the voices of intoxicated persons are frequently heard at a greater distance than 1,500 feet; that such persons frequently become boisterous; that they could easily go to the church or school and disturb the exercises; etc.

McGehee, J., in dissent was of the opinion that under the facts alleged in the petition—namely, that there was no place in the business section of the village which was not within 1,500 feet of the one church, in which religious services were held only once a month—the zoning order was not reasonable, and was, therefore, void. He, and Anderson, J., who agreed in a few sentences, pointed out that this zone could as reasonably have been extended, by zon-

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[186]Created by MISS. CODE ANN. (1930) § 1481.
[187]Mississippi State Hwy. Comm. v. Reddock, 186 So. 298 (Miss. 1939).
[188]Miss. Laws 1934, c. 171, § 18.
[189]*Id.* § 22. This section is in two parts whereof the first declares the legislative intent to privilege the lawful sale and manufacture of wines and beer within the state, and the second declares that nothing in the Act shall prohibit the zoning of territory surrounding churches and schools by municipalities and Boards of Supervisors.
[190]184 So. 153 (Miss. 1938).

ing area after area, in such manner as to make all or nearly all of the county 'dry', thus nullifying the statutory provisions for county option.

Griffith, J., who joined in the dissent, adverted to the reproach directed by the 'drys' to the 'wets' to the effect that, if the latter "be given an inch under the law, they will take an ell", and said that the former must be careful not to become subject to the same reproach. He enunciated the established legal principle that regulations by inferior bodies must have a reasonable relation to the objects to be accomplished and to the facts forming the basis for the regulation. He spoke of the fact that there was only one church in the zone and that services were held there only once a month, and of the declaration that this was a sufficient basis for prohibiting sales during the other days in the month, and concluded:—"The mere statement speaks for itself,—an inch is allowed by the law and an ell has been taken by those in authority under it".

(g) Action by Next Friend.

In *Prudential Insurance Co. v. Gleason*[191] it was held: (1) While in equity, under general jurisdiction, suit of a minor by his next friend is procedural, if the legislature has provided expressly that in partition proceedings "an infant may sue by his next friend as in other cases" the protective provision is mandatory, not directory, and a partition at the suit of the minor for himself is void. (2) Partition proceedings brought by a minor as guardian of minors cannot be treated as a suit of the minors by next friend, as a next friend must be an adult; and the proceedings are void.

(h) Injunction.

In *Lancaster v. Jordan Auto Co.*[192] the availability of injunctive relief may have been a contributing cause of a strict construction of the words "same transaction" in a decision denying recoupment to a defendant. It was pointed out that defendant has an appropriate remedy by way of stay of execution in the Circuit Court or by way of *injunction* in Chancery Court if plaintiff is insolvent, and that an independent collectible judgment would protect defendant if plaintiff is solvent.

Equitable Life Assurance Association of U. S. v. Gex' Estate[193] is an important and interesting case. It was there held that the courts of Mississippi will enforce an injunction issued from the court of a sister State forbidding extra-territorial suit upon a

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[191]187 So. 229 (Miss. 1939).
[192]187 So. 535 (Miss. 1939).
[193]186 So. 659 (Miss. 1939).

cause of action in which the said State had jurisdiction of the subject matter and of the parties who are both citizens thereof, or one a citizen and the other a foreign corporation qualified to do business there; at least if the cause of action arose there, if anywhere. It was said that the courts of our State will not examine the merits of the injunction—which was, in this case and should be in all cases, based upon the presence of witnesses in the enjoining State and upon an attempt to take advantage of more favorable evidentiary rules in the second State.

It will be seen that the question involved in this type of case is one of interstate venue, and that decisions on the question are based upon the doctrine of *forum non conveniens*. It should, however, be remembered that our states are juristically independent units, though they are constituents of a political whole, and that the question of the convenience or inconvenience of a particular forum is a matter to be decided by that forum, not one whose solution can properly be left to another jurisdiction.

In other words, the attitude of our court is conducive to fairness to corporate defendants, who are often harassed by migratory actions, but care must be taken to set up in each situation a Mississippi standard of fairness. It is not proper to accept the standard of another State, or its application in a particular case, without examination of the basis thereof.[194]

In *Rosenblatt v. Escher*[195] it was held that plaintiff might have *injunction* against repeated and threatened trespasses of cattle running at large upon her lands because the statutory remedy given by Sections 5442-5445, inc., Code of 1930, is inadequate in a case in which it is apparent that defendant intends to continue the trespasses. Defendant argued that plaintiff could get a better income from his land by taking up the trespassing cattle and charging for the trespasses—thus enforcing the statute—than he could by other use of the land. It was decided that this novel argument does not hold water, because an owner is entitled to use his land for what he considers his benefit; and a different, though greater, benefit cannot be forced upon him by a stranger: and that it may be true that the statutory remedy, even in this situation, would be adequate for a temporary trespass, but that it fails as an adequate remedy to prevent the entire wrong.[196]

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[194]See Foster, *The Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217; Blair, *Forum non Conveniens in Anglo-American Law* (1929) 29 COL. L. REV. 4.

An extended discussion of the problem will appear in an early issue of this journal.

[195]185 So. 551 (1939).

[196]*Semble*, Davis v. Wilson, 190 So. 716 (Fla. 1939). See also 1 POMEROY, EQ. JUR., § 245; 3 *id.* § 1357.

A question of adequacy of legal remedy apears in *Rockett v. Finley*[197] where it was held: (1) The remedy available through the power of the Circuit Court to set aside, at a subsequent term, a judgment obtained by fraud, is not as effectual and adequate as the remedy by way of *injunction* because the Circuit Court cannot so set aside a judgment in vacation; and, therefore, injunction properly issued. (2) Even if the remedy in Circuit Court were adequate, injunction may issue in such a case to restrain enforcement of the fraudulent judgment because the Constitution of 1890 gives the Chancery Court full jurisdiction in equity, and jurisdiction to restrain the enforcement of judgments unconscionably obtained existed at a time when law courts had no power to set aside judgments and to give new trials. No statutory expansion of the power of law courts can divest Chancery of its constitutional jurisdiction.[198]

The decision in *Riley v. Hardy*[199] may tend to discourage attempts to obtain the dissolution of injunctions which have been granted. In this case the petitioner for dissolution and his attorney had stipulated that there should be no attorney's fee unless the chancellor allowed a fee as damages upon dissolution of the injunction. It was held that the petitioner was not entitled to an award for solicitor's fees. The court said that a contract for a contingent fee is binding as between the parties, but that it cannot be recognized as a proper basis to charge adverse parties as they are liable only for the amount the petitioner has paid or become bound to pay.

It is clear that the court has and exercises power to fix solicitor's fees on dissolution on motion of an injunction wrongfully issued,[200] and it is equally clear that the fee fixed by the court is the "reasonable fee". If the court is going to adhere to the principle announced in this case, is there not considerable danger that justifiable attempts to obtain the dissolution of injunctions improvidently issued will be discouraged?

It is to be hoped that the court will enforce a carefully drawn contract, providing that the fee shall be the reasonable value of the service of the attorney, that the reasonable value shall be determined by the amount determined by the court to be reasonable, and that no fee shall be due unless the injunction were dissolved.

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[197]184 So. 78 (Miss. 1939).

[198]This subject is dealt with in GRIFFITH, CHANCERY PRACTICE, (1925) §§ 440-442, cited 184 So. at 80.

[199]189 So. 514 (Miss. 1939).

[200]New Orleans etc. R. Co. v. Martin, 105 Miss. 230, 63 So. 228 (1913); Silver Creek Co. v. Hutchins, 168 Miss. 757, 151 So. 559 (1934).

It is difficult to see what valid objection there is to a contingent fee for obtaining the dissolution of an injunction. Such a contract does not partake of the vices of a contract to share the amount recovered, because the reasonableness of the fee is controlled by the court and the danger of temptation to use improper means to increase the recovery is at a minimum.

It is difficult, also, to perceive a valid objection to a stipulation that the attorney should have recourse only to the injunction bond or its proceeds, but such a stipulation seems clearly to come within the doctrine of the instant case.[201]

(i) Mandamus.

Under the general principle that *mandamus* will issue to compel ministerial action it was held, in *Trustees of Geeville Consolidated School v. Gordon*,[202] that the writ was properly granted to compel the trustees to petition the Board of Supervisors of the County to borrow money to pay certain claims under Laws of 1936, c. 255, § 15; and, in *Board of Supervisors, Prentiss County v. McRee*,[203] that it properly issued to compel the Board to borrow money to pay teachers' and school carriers' pay certificates, and to issue notes or certificates of indebtedness therefor under § 15 of the same statute.

In the first of these cases, on the other hand it was held that it was erroneous to direct the Board of Supervisors as to the action to be taken when the petition should be filed, as the board was not a party. In the second case it was held that the writ should not issue to compel the board to levy a special tax if they were unable to borrow the money, because the power to tax was given to the board in its discretion.[204]

For the same reason the writ was refused in *Luter v. Board of Supervisors of Walthall County*[205] where *mandamus* was sought to compel the board to require a new official bond under Section 2984, Code of 1930.[206] It was said that it was fairly obvious that the finding of insufficiency was for the board and that an allega-

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[201]It is especially to be noted that the case cited by the court does not really raise the problem of the instant case, and is not in point unless the fact that the money burden on the client is not unavoidably increased is determinative. In Newton v. Biloxi, 76 Miss. 810, 25 So. 664 (1899), the recompense of the attorney and the obligation of the client in no way depended upon success in obtaining the dissolution of the injunction. The attorney was compensated by a fixed salary, win or lose.

[202]189 So. 97 (Miss. 1939).

[203]189 So. 95 (Miss. 1939).

[204]See also, Darden, *Remedies*, (1938) 11 MISS. L. J. 60, 62.

[205]189 So. 94 (Miss. 1939).

[206]". . . if, from any cause, an official bond shall be found insufficient, the

tion of insufficiency does not support the petition, without an allegation of finding by the board.[207] The same reason ruled the decision in *Re Validation of Bonds of McNeill Special Consolidated School District*[208] where it was held that the proper remedy to review the action of election commissioners in striking the names of certain voters after hearing testimony is by *appeal,* not by *mandamus* to compel the proper counting of the votes.

In *Garraway v. State* ex rel. *Dale,*[209] four reasons, each sufficient, made the writ unavailable. In the first place the ordinance for the enforcement of which the writ was sought did not identify the officials who should enforce it. In the second place it did not specify the manner of enforcement. In the third place the duties of the officials were not merely ministerial. In the fourth place another adequate remedy existed.

The facts were that the mayor and board of Aldermen of the town of Prentiss enacted an ordinance establishing a fire-limit district and forbidding the erection of certain types of buildings therein. Section 5 of this ordinance provided that buildings erected "in violation of this ordinance may be removed . . . by the authorities of said Town . . . at the expense of the owners . . . and such buildings may be condemned and sold by the authorities of said Town to pay the expense incurred in such removal thereof." A petition for *mandamus* directing the appellees "to enforce said Ordinance No. 96 in all respects according to its terms" was granted, and on appeal the order was reversed and the petition dismissed.

This result was reached, for the first reason set forth above, because the ordinance does not identify the "authorities" who are vested with power to enforce it. The writ issued erroneously, for the second reason, because the ordinance does not specify how it is to be determined that a given building violates it, nor does it specify what machinery is to be used to condemn, to remove, or to sell the building. Error was committed, for the third reason, because, supposing that the appellees are the "authorities", they must pass the necessary resolutions to fill up the holes in the machinery and "These necessary acts would not, under any definition, be merely ministerial duties".

Issuance of the writ constituted error, for the fourth reason, because the remedy by way of *injunction* in chancery to abate a nuisance is adequate, and the *extraordinary prerogative writ of*

. . . board of supervisors shall notify such officer to . . . give a new bond."

[207]It is to be noted that Griffith, J., considered the statute far from efficient, but allocated the duty of correction to the legislature, not to the courts. See 189 So. at 95.

[208]188 So. 318 (Miss. 1939).

[209]185 So. 803 (Miss. 1939).

mandamus may not issue. The adequacy of the injunctive remedy arises from the facts that it is now a quick remedy; pleading is simple; trial is usually to a judge without jury; and the chancery court can foreclose all possibility of suits for damages. The writ will therefore be refused to the relator and the other private persons who joined with him.[210]

Another decision treating *mandamus* as a remedy not available if another adequate remedy exists is that in *Abiaca Drainage District v. Albert Theis & Sons, Inc.*[211] The writ was there refused upon the ground that a plea of pendency of a chancery suit in which the same issue will be decided should be sustained in abatement, particularly where it appears that the solvency of the District was doubtful.

It is to be noted that the suit in chancery was not only adequate, but was preferable, because, as the court pointed out, *mandamus* would be upon too narrow an issue.

VIII.

PROPERTY

*Everett E. Cook**

A. Mortgages

(1) In General

In the case of *Adams v. St. Clair*[1] the deed of trust involved provided that "The corporation, its successors or assigns, or any subsequent holder of the note, the payment of which is hereby secured, may revoke the authority of any trustee and appoint another in his place at any time." The corporation, an instrumentality of the United States, by its board of directors, authorized its state manager to substitute trustees. Adams was so substituted, and in proceeding to foreclose, was enjoined.

The court held the substitution valid. "There was no personal discretion to be confided to any particuluar person in the matter of the appointment of a substituted trustee." The doctrine of *delectus personae* should have no application to a corporation. Also,

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[210]The court said that the remedy by way of criminal prosecution under § 6 of the ordinance, which was the only existent method of enforcement by the mayor and aldermen, would be wholly inadequate to abate the nuisance.

[211]187 So. 200 (Miss. 1939).

*Member Mississippi and Harrison County Bars; Gulfport, Miss.

[1]188 Miss. 559 (Miss. 1939).

as to ratification of the act by the corporation,[2] it was observed that the corporation ratified the appointment of the State Manager by appearing and moving to dissolve the injunction.[3]

In *McFarlane v. Plant*,[4] a mortgaged homestead owned by husband was destroyed by fire, and the mortagee by agreement with husband permitted the insurance money to be used to rebuild the home. The wife attacked a subsequent foreclosure and claimed payment by the insurance proceeds in extinguishment of the debt and satisfaction of the deed of trust.

The court held that whether a transaction constitutes a payment and discharge of a mortgage depends on the intention of the parties thereto. "It will not have that effect when they mean to keep the security alive and not to extinguish it. The proceeds of insurance upon mortgaged property, while primarily a payment on and satisfaction pro tanto of the mortgage debt, may, by agreement between the mortgagor and mortgagee, be diverted to other uses." The husband owning the property also owned the insurance proceeds; the veto power of a wife[5] against encumbrances and conveyances of the homestead does not limit the husband's common law rights to deal with the indebtedness secured by the homestead.

(2) Foreclosure

It is interesting to compare the rules laid down in the case of *Connecticut General Life Insurance Company v. Lombard*[6] with the other cases decided at the same term of the court on the "mortgagee in possession" question. In this case a foreclosure was declared void where the mortgaged property lay in two counties, and although the deed of trust provided that sale might be made in either county, notice was published and posted only in the county in which the sale was made. It was held that such notice must be posted and published in both counties. On suit to set aside the trustee's deed, the appellant set up that it was a mortgagee in possession and the appellee would have to tender and pay into court the full amount of the debt due before he could maintain the suit. The court disposed of the question by holding that "Under a deed of trust such as is here involved, after condition broken, the title vests in the trustee . . . If the sale is void because the trustee failed to comply with the terms of the instrument, or of the law

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[2]Citing Chandler v. Bank of Brooksville, 181 Miss. 529, 178 So. 797 (1938).
[3]Citing Helms v. Home Owners' Loan Corp., 103 S. W. (2d) 128 (Texas 1937).
[4]188 Miss. 530 (Miss. 1939).
[5]Miss. Code Ann. (1930) § 1778.
[6]185 So. 260 (Miss. 1939).

governing such matters, the debtor has the right to have the sale set aside and to pay off the deed of trust and to use the property in refinancing that operation if he can do so, up to the time of the consummation of the sale, which is to say, a valid sale."

It must be noted, however, that this case was remanded to the court *in banc* for consideration of the full court and settlement was made by the parties. The opinion was later withdrawn.[7]

The case of *Wirtz v. Gordon*,[8] emphatically sustained the "mortgagee in possession" theory, extending it to minors and to independent purchasers.

A foreclosure was made as against minors, and a third party (but holder of mortgage bonds) became the purchaser and took possession after confirmation of the sale.

The minors sought to set aside the foreclosure, claiming that service of process on them in foreclosure suit was void, and asked for partition. "Courts of equity will decline to entertain a bill for relief against an invalid foreclosure sale without a tender or offer to pay the mortgaged debt, and this requirement to do equity applies to adults and infants alike."

"Whether the purchaser in possession under a void foreclosure sale be the mortgagee or a third party, the established rule is that the only right or remedy of the mortgagor or those claiming under him, is to redeem the land from the mortgaged indebtedness."

These two cases dealing with the same point were both decided by Division B of the Supreme Court within thirty days of each other.

In *Mechanics State Bank v. Kramer Service, Inc.*,[9] the court held, "It is an invariable rule that junior encumbrancers must be made parties defendant to a suit to foreclose a senior encumbrance, as they have the right to appear and pay off the senior encumbrance, and per consequence to see to the taking of the account and that it be correctly taken."[10]

The thought occurs as to whether an analogous situation might be presented in a foreclosure *in pais*, applying the above rule to such foreclosure.

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[7]189 So. 818 (Miss. 1939).
[8]184 So. 798 (Miss. 1938).
[9]186 So. 644 (Miss. 1939).
[10]GRIFFITH, MISSISSIPPI CHANCERY PRACTICE (1925) § 116.

The appellee in *Anthony v. Bank of Wiggins*[11] made a foreclosure on March 6, 1933, after the proclamation of the President of the United States closing all banking institutions and prohibiting them from transacting any banking business whatever. The appellant in defending a suit for possession raised this objection, and also the inadequacy of price paid at the sale. The court held that there was no authority in law for the issuance of the proclamation until March 9, 1933 when approved by Congress, and it was not retroactive. As to the price paid, the court commented on the additional burden of taxes, accrued interest, *etc.*, which amounted to the bank paying all the property was worth, stating, "Ordinarily mere inadequacy of price alone, in the absence of fraud or unfair advantage, will not be sufficient to warrant the setting aside of a sale."

In *Blakeney v. Smith*,[12] the mortgagor signed a deed of trust as B. Blakeney, and the notice of trustee's sale designated him as B. B. Blakeney. The wife's name was correct and reference was also made to the record of the instrument in the Chancery Clerk's office.

The sale was held void, the court saying: "The Statutes require the identity of the mortgagor to be disclosed by setting forth his name." The court held that such designation as B. B. Blakeney was another and different name and could not be held to refer to B. Blakeney.

In a foreclosure by a Commissioner in Chancery, a typographical error was made in the proof of publication of notice of sale describing a section as No. 323 instead of 32. The decree ordering the sale and the notice as posted, properly described the land, and no contest was made on the point at the hearing of the commissioner's report, and same was confirmed. The attack was made after a writ of assistance was sought. The court held that the objection to the error was waived by the failure to contest the confirmation.[13]

In *Hamilton v. Federal Land Bank*[14] farm property was not sold by a trustee in parcels, but as a whole. The mortgagors were present at the sale and made no objection to the procedure. The court held that such served as a waiver of the irregularity. "No sale is either void or voidable on account of the departure, if there has been any departure, from a condition or stipulation which has been waived."

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[11]183 Miss. 885, 184 So. 626 (1938).
[12]183 Miss. 151, 183 So. 920 (1938).
[13]Corder v. Whitesides, 183 Miss. 358, 184 So. 449 (1938).
[14]186 So. 832 (Miss. 1939).

The court in *Chapman v. Federal Land Bank of New Orleans*[15] directs that when a sale is postponed, the trustee should remove the notice of such sale from the courthouse door where posted, but in absence of a showing that the purchasers were misled and that the property brought less than its real value, reversal would not be granted for a failure to remove the notice.

(3) Moratorium

No moratorium cases are referred to here except *Jefferson Standard Life Insurance Co. v. Noble.*[16] The Moratorium Acts[17] were declared void and unconstitutional in this case.

The economic history of the state was reviewed from the date of the passage of the original Moratorium Act of 1934[18] to the date of the opinion, taking judicial notice of various Federal and State departmental reports and judicial knowledge of the conditions as existed on the date of its passage and the present conditions, holding that in former cases decided by the court the emergency as set out by the legislature existed, but that such emergency no longer exists.

The court stated that the Moratorium Act "is temporary in its nature," and that no public emergency existed when the 1938 law[19] was passed.

"When the emergency ceases, the Statute permitting the court to enjoin the enforcement of a perfectly valid contract immediately ceases, and its enforcement after the emergency no longer exists violates the contract clause of the Constitution."[20]

B. Tax Titles

In the writer's opinion, the implications of *State* ex rel. *McCullen v. Adams,*[21] are far-reaching, opening the titles of many parcels of property patented by the State of Mississippi to attack by the State Land Commissioner and increasing the hazards of the title examiner where such titles are involved.

In this case Mrs. Adams applied to the State for a forfeited tax land patent to 160 acres, stating that the land was cut-over land, none open or in pasture land, etc., and the value was $_____.[22]

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[15]185 So. 586 (Miss. 1939).
[16]188 So. 289 (Miss. 1939).
[17]Miss. Laws 1934, c. 247; Miss. Laws 1936, c. 287; Miss. Laws 1938, c. 346.
[18]Miss. Laws 1934, c. 247.
[19]Miss. Laws 1938, c. 346.
[20]188 So. 289, 292 (Miss. 1938).
[21]188 So. 551 (Miss. 1939).
[22]Miss. Laws 1936, c. 174, § 5.

Patent was issued for $160.00, and she later sold the land to a third party by a special warranty deed for $1600.00. Applicant knew that 34 acres was cultivated.

The court held that the application, being a condition precedent to the right to obtain a patent, and the concealment of the fact of cultivation constituted a fraud on the state, that the omissions of answers which the law imposed on him (the applicant) the duty to answer, "the Commissioner was without authority to waive. The Land Commissioner, being a public officer, could not knowingly accept a fraudulent statement, that if he did so, his act would not bind the state."

The court held that the third party purchaser was not an innocent purchaser because:

1. The application for the patent was a condition precedent to the right to obtain a patent and "such application constituted a part of the patentee's muniment of title and which (the third party as vendee of the patentee) was charged with notice."

2. The difference in price received by the state and for which the third party paid (having been multiplied ten times) should have put him on an inquiry.

3. The fact that the grantor did not give an unconditional warranty should have incited his interest.

The writer believes that it is an almost statewide custom for a seller to refuse to give a warranty deed on tax title property because of the hazards therein, primarily from attacks from former owners or lien holders. The court's interpretation of the matter indicates that the mere fact of a conveyance by special warranty should put the purchaser on notice, which in turn tends to form a "vicious circle" increasing the hazards of tax titles which in turn will tend to further limit the warranties of a conveyance of tax title property.

In *Mortimer v. Curlee*,[23] two applications for forfeited tax land patent to same property were filed same date, and duplicate patents were issued to applicants on the same date. The prior numbered patent was issued to the second numbered applicant. The appellant claims that the laws[24] providing for consecutive numbering of applications gave him the right to the land, and asks for the prior numbered patent to be cancelled.

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[23]183 Miss. 17, 183 So. 485 (1938).
[24]Miss. Laws 1936, c. 174 §§ 4, 5.

It was held that regardless of priority "the applicant does not become entitled to acquire a patent under this act until the price of the land has been fixed and the sale has been actually made, with the approval of the governor," and further that there was no authority to issue further patent notwithstanding the fact that a previously filed application existed.

A tax sale was made in June, 1932. The sale matured and the property was patented to appellant. Appellant's title was held void in *White v. Noblin.*[25] "The Board had no authority to order a sale for delinquent taxes until after the third Monday in September." A sale made in June is of no legal effect and conveys no title.[26] The suit was brought by patentee, and the cross bill was filed after two years of the effective date of Chapter 196 of the Laws of 1934. The court held, as in *Russell Investment Corporation v. Russell,*[27] that such statute does not apply to an owner in possession.

Two parcels of land, in separate sections but comprising one tract of land assessed to same person, were sold for taxes and conveyed by two separate deeds. The sale was held void under Section 3249 of the Mississippi Code of 1930 in *Carter v. Moore,*[28] implying that one sale should have been made for the aggregate amount of taxes due on the entire tract. The suit was brought after three years of the maturity of sale,[29] but property was owned by life tenant and suit was brought within three years from her death, and the court held that this three year statute did not run to cut off remaindermen, but the time was to be computed from the death of the life tenant.

C. Homestead

A unique situation arose in the case of *Dogan v. Cooley.*[30] An amendment was offered in the lower court claiming homestead exemption, but was withdrawn. Although the question was not technically before the appellate court, it mentioned that counsel had withdrawn the amendment "under the coercion" of a former Supreme Court decision.[31] The question, even though not raised by the pleadings, was considered and the decision referred to was overruled. Several cases were reviewed as being the law of the state which were directly in opposition to the former case, the court mentioning that such cases were not before the court or presented

[25]183 Miss. 92, 183 So. 914 (1938).
[26]Smith v. Hendricks, 181 Miss. 229, 175 So. 819 (1938).
[27]182 Miss. 385, 182 So. 102, 108 (1938).
[28]183 Miss. 112, 183 So. 512 (1938).
[29]Miss. Code Ann. (1930) § 2288.
[30]185 So. 783 (Miss. 1939).
[31]Referring to Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1938).

by counsel.[32] The cases reviewed involved the principle of the allowing of the homestead exemption above the amount of incumbrances and the law was reinstated in conformance with these cases.[33]

The homestead exemption was protected in *Bank of Myrtle v. Garrison.*[34] Sanderson and wife owned property as tenants in common. The wife died, leaving seven children. Sanderson was an exemptionist over sixty years old, the land was less than 160 acres, and of value less than $3,000.00 He sold the property to a third party, taking notes secured by a deed of trust for the purchase price.

Appellant bank sought to realize from the proceeds of the notes in the subject case. Subsequent to the filing of the bill, the purchaser of the land becoming dissatisfied with the title, reconveyed the property to Sanderson in return for the cash paid and cancellation of the notes. Sanderson then died, and the children were made defendants and claimed the exemption for his estate.

The court, citing Sections 1765 and 1777 of the Mississippi Code of 1930, stated that the purpose of the statutes was to give the surviving spouse the benefit of the exemption even if it should be best to sell the homestead, and where the proceeds went to reacquiring it as in this case, they would remain proceeds of the exemption.

D. Adverse Possession

In *Seymour v. Lamb,*[35] appellee purchased property, part of which was previously mortgaged to appellant and openly exercised ownership over it for more than ten years. Appellant became the purchaser at the foreclosure sale, but appellee claimed title by adverse possession. Less than ten years had elapsed since the foreclosure.

The court held that the adverse possession did not start to run against the mortgagee until after foreclosure. (The mortgagor) "was rightfully in possession as against appellant until she conveyed to appellees, and then the latter were in rightful possession under such conveyance until the foreclosure and purchase by appellant. Until that time they had the right, as did (the mortgagor)

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[32]See also (1938) 11 Miss. L. J. 55.

[33]See Edmonson v. Meacham, 50 Miss. 34 (1874); Meacham v. Edmonson, 54 Miss. 746 (1877); Koen v. Brill, 75 Miss. 870, 23 So. 481 (1898); Hays v. Barlow, 98 Miss. 487, 54 So. 2 (1911).

[34]183 Miss. 526, 184 So. 291 (1938).

[35]185 So. 824 (Miss. 1939).

to possess, improve, and use the land as their own. It was in fact their own, subject to the mortgage. The presumption is, they held it subject to the mortgage."

E. Wills

Eatherly v. Winn.[36] The testatrix died January 11, 1938, ordering her just and legal debts to be paid, and leaving property to Eatherly on which the 1937 taxes were unpaid. Eatherly paid the taxes and sought to recover from the estate. Testatrix had named two executors and also an umpire who should give a decision in event of disagreement between the executors, which should be decisive. The question of allowing the claim was disagreed upon between the executors, and the umpire advised them not to pay it.

The court held that the taxes were a matured debt of testatrix and allowed the claim. The court construing the will on the umpire feature held that the umpire was intended to bring about harmony and "was not invested with the power to construe the will," and further held that the umpire had decided contrary to the intention of the testatrix. "While we look with favor upon the decisions of an umpire, named as such in a will, invested with the power to determine the questions that arise in the construction of a will, when the umpire decides contrary to the forms of the will as in this case and also contrary to the existing statutes and the plain law of this state with reference thereto, then the decision of the umpire cannot stand."

F. Future Interests

The case of *Balfour v. Wells*,[37] covered a question of future interests. McKenzie left property for his daughter for life, remainder to "her children." At the time of McKenzie's death his daughter had one child, Richard Love. Love pre-deceased his mother, leaving his widow, the appellee, as his sole heir.

Appellants filed their bill asking the court to construe the will to mean that a contingent and not a vested remainder was created, and that on the death of the daughter, without surviving children, that the property should descend to all the heirs at law instead of to the appellee.

The court held that the remainder "became vested in (the appellee) at the time of the death of the testator, although the enjoyment of this vested remainder by him or his heir at law was postponed unto the death of the life tenant."

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[36]189 So. 99 (Miss. 1939).
[37]183 Miss. 707, 184 So. 313 (1938).

G. Navigable Waters

The state, in attempting to collect damages from a property owner for removing gravel from the bed of a bayou was confronted with the question of the title thereto in *State ex rel. Rice v. Stewart.*[38] The property owner sought to abolish the distinctions used by the courts as to boundaries set by the common law as to tide water and fresh water streams.

Mr. Justice McGehee cites the opinion of the United States Supreme Court[39] in holding that the rule of ownership will be limited to the law of the state. Mississippi following the common law would adhere to the distinction "that the right of soil owners of land bounded by the sea, and on other navigable waters, where the tide ebbs and flows, extends only to high water mark; that the shore below ordinary high-water belongs to the state, as trustee for the public; . . . the people, have the absolute proprietary interest in the same; that the sovereign is trustee for the people, and the use of navigable waters is inalienable, but that the shores of navigable waters, and the soil under them, belong to the state in which they are situated, as sovereign; that the right of sovereignty in public rivers above the flow of the tide is the same as in tide waters; that they belong to the public, except that the proprietors adjoining such rivers (referring to fresh water rivers) own the soil." It further held "the State of Mississippi to be the absolute owner of the title of the soil, and of the minerals therein contained in the beds of all of its shores, arms and inlets of the sea, whereever the tide ebbs and flows, as trustee for the people of the State, and subject only to the paramount right of the United States to control commerce and navigation."

In quoting the decisions which make the distinction as to whether a stream is navigable or not, the definition of a navigable stream is given, "a river is navigable in the technical sense, as high up from the mouth as the tide flows." In determining whether a stream is navigable or not would seem to depend not on whether it can be traversed by a ship, but whether it is affected by the tide.

H. Miscellaneous

A further protection of municipalities as against tax claims was extended in *Davis v. City of Biloxi.*[40] Appellee, City of Biloxi, purchased property on August 19, 1932 for school purposes, but did not place its deed of record. The property, being assessed for

[38]184 So. 44 (Miss. 1938).
[39]Packer v. Bird, 137 U. S. 661 (1890).
[40]183 Miss. 340, 184 So. 76 (1938).

1932 taxes to an individual and the taxes not being paid, was sold to the State September 18, 1933 by the Sheriff and Tax Collector, and after maturity was patented to appellants.

The city claiming title, sought to enjoin a sale of the property by appellant. The appellants claimed that the property was liable for assessment for the 1932 taxes because owned by an individual on January 1, 1932, and further indicated that they were in the possition of innocent purchasers for value because the city deed was not of record.

The court held that "the city had title when it procured its deed, and the property then became exempt from taxation under the cases referred to.[41] The failure to put the deed on record, sofar as the tax title is concerned, is, in our opinion, of no consequence. It turns upon the question of ownership, and the title of the city was complete without such recording . . . The acquirement of title by the city extinguished the assessment, and thereafter it had no force or validity, sofar as tax proceedings were concerned."

A deed conveying 148 acres in Lots 2 and 3, etc., was held void for uncertainty, in *Crosby Lumber & Manufacturing Company v. Elsas*,[42] where it was shown that Lots 2 and 3 contained 148.74 acres and deed did not show where the .74 acre omitted was located.

The case of *Dockery v. Zerkowsky*[43] reiterates that an owner of land out of possession is authorized to resort to an equity court to remove clouds and confirm titles,[44] and that deraignment of title from a common source is sufficient.

IX.

TAXATION

*Stovall Lowry**

A. General Property Tax

(1) Assessment

Cases continue to abound wherein the Board of Supervisors has failed or is alleged to have failed to track the statute in assessing, equalizing or levying taxes. The diligence and ingenuity of counsel, if nothing else, make some of these cases worth noticing. Reiterating what it has said on previous occasions, to the effect that "a Board of Supervisors is a court of special and limited

[41]City of Meridian v. Phillips, 65 Miss. 362, 4 So. 119 (1888); Church v. McNeal 86 Miss. 22, 38 So. 195 (1905); Laurel v. Weems, 100 Miss. 335, 56 So. 451 (1911); Alvis v. Hicks, 150 Miss. 306, 116 So. 612 (1928).

[42]183 Miss. 107, 183 So. 499 (1938).

[43]189 So. 797 (Miss. 1939).

[44]See Miss. Code Ann. (1930) § 404.

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jurisdiction in assessing property for taxation, and that the records of the Board of Supervisors should affirmatively show all jurisdictional facts to have existed when the board proceeded to act in making the assessment roll final, and in its proceedings in equalizing and assessing taxes",[1] the Supreme Court continues to scrutinize the record of proceedings before the board with care; but there is some indication that the court is coming to feel that the raising of technical questions in these cases has been somewhat overdone.

In *Federal Land Bank of New Orleans v. Cox*,[2] the minutes of the Board of Supervisors at its August meeting, when the tax rolls were equalized, failed to recite that notice to taxpayers had been given and proof of publication of such notice filed; and it appeared from testimony of the deputy clerk that no proof of publication of the notice was actually on file at the time the August meeting was held. The assessment was held to be void, and the sale of the land based on that purported assessment also void.

But in the case of *Mullins v. Lyle*[3] where the board entered the entire publication and the publisher's proof of publication on its minutes at the August meeting, it was held that the fact of the notice having been published and the proof of publication having been placed on file was sufficiently shown, notwithstanding the fact that the minutes did not definitely recite that the notice and proof were on file, and there was not shown by the minutes any formal adjudication by the board that the publication and notice were then on file. In this case it was also held that the statute requiring the seal to be on all process has no application to a general notice published by a board of supervisors to the public or a part thereof not specifically named.

In *Day Brothers v. Board of Supervisors of Webster County*[4] the appellant sought a review of an assessment of taxes made by the Board of Supervisors. This case quotes and discusses the statutes which prescribe the procedure to be followed by the board in assessing and equalizing taxes,[5] and gives rather a clear and complete statement of their meaning and application. The board had increased the assessment upon the appellants' property over the amount fixed by the tax assessor, at its regular July meeting. Thereafter it gave notice by publication in the required manner that it would hear objections at its August meeting. Appellant

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[1]Pettibone v. Wells, 181 Miss. 425, 179 So. 336 (1938).
[2]183 Miss. 250, 183 So. 482 (1938).
[3]183 Miss. 297, 183 So. 696 (1938).
[4]183 Miss. 240, 184 So. 453 (1938).
[5]Miss. Code Ann. (1930) §§ 3162, 3164, 3165, 3166.

contended that the board should have sent out notice by mail regarding the increase that was made. But the Supreme Court held that the statute requiring notice by mail to individuals whose assessments are raised refers to raises made at the August meeting, after the notice by publication, and does not apply to raises made at the July meeting prior to the notice of publication. The taxpayer was precluded from appealing to the Circuit Court, all of the proceedings with reference to notice *etc.* being regular, and no objection to the assessment having been made at the August meeting.

A further increase in this same assessment was made later pursuant to order of the State Tax Commission, and appellant objected that the minutes of the Board of Supervisors failed to show the full contents of the order of the Tax Commission, and failed to have notice given by mail of this increase. It was held that the minutes of the board need show "substantially" the contents of the Tax Commission order only and that the statute[6] which appellant relied on with reference to notice by mail in this instance had no application to this particular situation.

In *Simpson v. Ricketts*,[7] the appellants were a mother and her three daughters whose land had been sold for taxes, bought at the sale by one of the appellees and by him conveyed to the other appellee. Appellants filed their bill in chancery to confirm their title to the land, to cancel the tax deed to appellee Brown and his conveyance to appellee Ricketts, to recover rents, and for partition.

In the trial court appellants failed to sustain their contentions that there were irregularities in the proceedings of the Board of Supervisors voiding the assessment. Their bill was dismissed, and the appeal is from the decree dismissing the same.

Interesting questions involved are (1) whether appellants who were minors at the time of the tax sale, and who brought their suit attacking the same within two years after they had become of full age, had a right to redeem their interest in the land; and (2) if so, did the Chancery Court have jurisdiction of their suit to redeem, or were they restricted to use of the method for redemption provided by the statute.[8] The holding was that they did have

[6]Miss. Code Ann. (1930) § 3185.
[7]186 So. 318 (Miss. 1939).
[8]Miss. Code Ann. (1930) § 3264.

a right to redeem; and that, inasmuch as the statute did not afford them an adequate remedy, they might invoke the jurisdiction of the Chancery Court.[9]

(2) Sales and Suits to Collect Taxes.

Several cases have to do with tax sales and proceedings otherwise than by sale to collect taxes. Perhaps the most important and most interesting is that of *Gully, State Tax Collector, v. Lincoln County*.[10] The appellant filed this suit in the Circuit Court to collect his commission from the county upon an amount of taxes collected through his efforts and paid over to the county as a result of a suit brought by him as Tax Collector against the Denkman Lumber Company. The taxpayer was legally assessed with taxes on real and personal property in the county for the year 1933. No payment thereon had been made on February 1st, 1934, nor on May 1st, 1934, nor up to the time of the filing of the State Tax Collector's suit on June 4th, 1934. The sheriff had taken no steps to distrain and sell the personal property or to sell the realty, although otherwise the sheriff was actively engaged in collecting taxes. After the State Tax Collector's suit was filed the taxpayer paid his taxes to the sheriff and the suit was dismissed. The instant suit against the County turns upon the question of how far the sheriff's exclusive right and duty to collect taxes extends, and when the State Tax Collector may intervene and proceed by suit to collect taxes under the authority of Section 6986 of the Code of 1930. It was held that the Constitution[11] impliedly requires that State and County *ad valorem* taxes shall be collected by the sheriff, that a statute cannot take away the primary duty thus placed upon the sheriff by the constitution, and that no other officer can intervene until the time allowed the sheriff to enforce collections has expired. This case would have furnished no problem before the adoption of the installment plan for payment of taxes.[12] But it was held that the time now allowed the sheriff to collect *ad valorem* taxes on personalty does not ex-

[9]Another point worth noting in this case is that as between the adult appellant and the grantee of the purchaser at the tax sale, the latter was held to be estopped to claim any interest adverse to the former, for the reason that he was a tenant under a lease contract at the time he acquired his alleged interest, the lease contract having been made between the two after the tax sale. The court states the rule thus: "A tenant who acquires the interest of a purchaser of land at a tax sale made before the beginning of his tenancy can only assert his claim of title against the landlord after surrendering possession to the landlord pursuant to the rental contract.", citing Johnson v. Langston, 179 Miss. 622, 176 So. 531 (1937).

[10]185 So. 795 (Miss. 1939).

[11]Miss. Const. Art. V, § 135.

[12]Miss. Laws (Ex. Sess. 1932) c. 383 § 1. Miss. Laws 1934 c. 188 §§ 1, 5, 7, 8, 9.

pire until such time after August 1st as is required to give necessary notice and make sale of personal property, or until and including the third Monday in September; and that the time allowed the sheriff to collect *ad valorem* taxes on realty does not expire until after the completion of the sales begun on the third Monday in September. This case was decided in favor of the defendant in the trial court, and the decision affirmed by an evenly divided Supreme Court. Judge Griffith wrote the majority opinion, and Judge Ethridge a strong dissenting opinion. Judge Griffith further elaborated the ideas of the majority upon overruling a suggestion of error.[13] It would require too much space, and would be out of the scope of this review to analyze the reasoning of either of these opinions. The holding is that the suit by the State Tax Collector against the taxpayer was premature, and the county owes the State Tax Collector no commission.

A case in which the sale of land for taxes was held void because the sale took place on an improper day is *White v. Noblin.*[14] At its May meeting the Board of Supervisors ordered the sheriff to sell all delinquent lands on the first Monday in June. Following the holding announced in *Smith v. Hendrix,*[15] the Supreme Court held that the board had no authority to order delinquent lands sold on any date prior to the third Monday in September.

It was further held in this case that the owner in possession was not barred by the two year tax statute of limitations[16] from raising the point of the invalidity of the tax sale, since the *Russell Investment Company* case[17] distinctly held that the two year statute has no application to a situation where the owner has continued in possession, either in person or by a tenant.

In *Carter v. Moore*[18] the decision depends upon whether the sheriff in making sale of land for delinquent taxes sold the land in the manner in which the statute[19] directed it to be sold. This is not the usual question of whether the sheriff first offered the land in 40 acre parcels; the question appears to be a new one. It is this: Was all the land constituting one tract and assessed as the property of one owner sold at one sale, or were there two separate sales of land, each for a separate consideration, covering one tract of land assessed to one owner? The title of the appellant Carter depended upon two tax sales, one made in 1921 and the

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[13]186 So. 830 (Miss. 1939).
[14]183 Miss. 92, 183 So. 914 (1938).
[15]181 Miss. 229, 178 So. 819 (1938).
[16]Miss. Laws 1934 c. 196.
[17]Russell Inv. Corp. v. Russell, 182 Miss. 385, 182 So. 102, 108 (1938).
[18]183 Miss. 112, 183 So. 512 (1938).
[19]Miss. Code Ann. (1930) § 3249.

other made in 1930. It was manifest from the deeds that there were two separate sales in 1921, to two different individuals, the part of the land lying in section 29 being conveyed to one person, and the part lying in section 30 being conveyed to another, and each deed reciting as consideration the amount of the taxes and damages due on the particular piece of land sold.

The appellant himself was the purchaser at the 1930 sale, but the tax collector executed two deeds to him, the recitations in the deeds clearly indicating that there was not just one sale made, but that there were two. Accordingly both sales are held to have been void.

In this same suit there arises another interesting and important point. In 1915 the land involved had been left by will to a life tenant and remaindermen. The life tenant died in 1936. The appellees in this suit are the remaindermen. Appellant argued that even though the tax deeds are void, the appellees are barred by the three year statute of limitations[20] from asserting their interest. The court held that the statute of limitations was not intended to cut off remaindermen, even though it contains no special saving in favor of remaindermen. Citing *Clark v. Foster*[21] and *Jordan v. Bobbitt*[22] which cases, although not directly in point, contain holdings that a right of action of remaindermen does not accrue until the death of the life tenant, the court says: "We are unable to see any good reason why this same rule should not be applied to the statute of limitations here involved." The remaindermen asserted their interest in this suit within less than three years from the death of the life tenant so the decision is in their favor.

The case of *Lear v. Hendrix*,[23] upholding the title of a purchaser from the City of Yazoo to a lot which the city had theretofore acquired at a municipal tax sale, as against the claim of the former owner of the lot, deals with powers of a city operating under a special charter to assess, levy and collect taxes in accordance with its ordinances. Among other things the ordinance provided for tax sales on the first Monday in March, whereas the statute fixed the first Monday in April. The title depending upon a sale made on the first Monday in March, in accordance with the city ordinance, was upheld, the court pointing out that the statute[24] provides that none of the Code chapter sections shall repeal any of the provisions of private or special charters.

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[20]MISS. CODE ANN. (1930) § 2288.
[21]110 Miss. 543, 70 So. 583 (1916).
[22]91 Miss. 1, 45 So. 311 (1907).
[23]187 So. 746 (Miss. 1939).
[24]MISS. CODE ANN. (1930) § 2623.

In *Davis v. City of Biloxi*[25] the controversy was over title to some lots which had been sold for state and county taxes in 1933, deeded to the state pursuant to that sale, and subsequently patented by the state to the appellants. After January 1st, 1933, when the lien for taxes had attached, but prior to the sale for taxes, the owners of the lots deeded them to the City of Biloxi for school purposes. The deed to the city was not recorded in 1933, and in fact was not put on record for several years thereafter, but the court holds that the ownership is the thing, and that where no question of notice is involved the fact that the deed was not recorded makes no difference in the solution of the problem. The cases are collected and reviewed in the opinion, wherein it has been held that inasmuch as lands belonging to the city are exempt from taxation, any existent tax lien is discharged when the city takes title prior to the tax sale. Following these cases, of which the case of *City of Laurel v. Weems*[26] appears to be the leading one, it was held that the tax lien under which these lots were sold in 1933 had been discharged and ceased to exist upon the acquisition of the title by the city prior to the sale.

A previous direct action by the State Tax Collector to collect *ad valorem* taxes on realty, and the compromise thereof, gave rise to a novel situation and an interesting question in *South Mississippi Land Company v. Allen*.[27] The appellant's cutover lands in Smith and Simpson counties were assessed for the biennium 1934-35 at $3.50 per acre. The lands were sold in 1935 for the 1934 taxes. Before the expiration of the period of redemption they were again assessed, for the biennium 1936 and 1937, at the same valuation. In 1936 the State Tax Collector brought his suit to collect 1934, 1935 and 1936 taxes. It appeared in that suit that the assessments were made in regular and proper manner and were not objected to or appealed from; but it did appear that the sale of the lands in 1935 was void because of the manner in which the sheriff offered and sold the lands. The defendant claimed that the valuations were excessive and discriminatory, but the suit was disposed of by a compromise and an agreed decree was entered settling the suit on the basis of a valuation of $2.25 per acre; in fact the decree recited that it was agreed that $2.25 per acre was a reasonable and just valuation for the years 1934-1935 and 1936-1937. It is stated that the chancellor had the members of the Board of Supervisors brought into open court, and that they agreed to the entry of this decree. No change was made by the board in the assessment roll, however, and the sheriff undertook to collect taxes for 1937 at

[25]183 Miss. 340, 184 So. 76 (1938).
[26]100 Miss. 335, 56 So. 451 (1911).
[27]187 So. 758 (Miss. 1939).

the assessed valuation of $3.50 per acre. When taxes on that basis became delinquent the sheriff advertised to sell the lands, and this present suit was brought by the taxpayer to enjoin the sheriff from making that sale.

It was held that the taxes for the year 1937 were not involved in the Tax Collector's suit, and therefore the consent decree purporting to fix the valuation for the biennium 1936-1937 was not conclusive on the question of valuation for 1937 in this suit. The Board of Supervisors' alleged consent to the compromise, if it had any force, applied only to the taxes involved in the suit compromised, to-wit, 1934, 1935, and 1936 taxes. The decree dissolving the injunction was affirmed.

A very unique situation existing between the parties gave rise to a difficult question in the case of *Norton v. Graham.*[28] The complainant claimed title to certain land in Lauderdale county, having acquired in October of 1927, through a chain of conveyances the interest of one Richardson who purchased at a tax sale in 1920. Complainant filed her bill in the Chancery Court to confirm her title and to remove clouds, immediately after her acquisition of the deed in 1927. Certain defendants in that suit, who are now the defendants in this suit, answered and among other defenses set up a claim of ownership by adverse possession, claiming that they had been in possession since 1891. Obviously their claim by adverse possession could not avail them anything in that suit because it had been only seven years since the sale for taxes in 1920. A decree was entered in that suit confirming the tax title of complainant, and cancelling all claims to title of every nature by the adverse parties. The complainant in that suit did not ask for possession of the premises, brought no ejectment proceeding, failed to take possession, and these aforementioned defendants continued in possession. The present suit was filed by the complainant to recover damages to timber and for possession and other relief. Defendants again rely upon adverse possession, and the question is whether or not they can tack their possession for six years since the decree entered in the former suit onto their possession prior to that decree, to give them the necessary ten years of adverse possession. In other words, the question is, what was the effect of the former decree as to whether or not it concluded the issue of adverse possession; did it terminate the running of time under the statute,[29] as of its date? The holding is that the former decree did so conclude the matter of adverse possession as of the date of that decree. Judge Anderson writes a vigorous dissent, citing the old case

[28]187 So. 510 (Miss. 1939).
[29]Miss. Code Ann. (1930) § 2287.

of *Bell v. Coats*,[30] and expressing the opinion that it is directly in point, notwithstanding the fact that at the time of *Bell v. Coats* the Chancery Court had no power to award possession in a suit to confirm title. Upon the overruling of a suggestion of error Judge McGehee also writes a dissent.[31]

(3) Tax Patents

Two cases involving the validity of patents to state owned lands, obtained under the provisions of the act of 1936,[32] are worthy of attention. In *State ex rel. McCullen, Land Commissioner v. Adams*[33] the appellant filed his suit to cancel as having been obtained through fraud a patent issued to one of the appellees, and also to cancel the deed of that appellee to another. The first point was whether or not the statement in the application that the land was cut-over land, when as a matter of fact a large area of it had recently been in cultivation, was such a concealment of a material fact, and so influenced the Land Commissioner in fixing a grossly inadequate price, as to constitute fraud justifying the cancellation of the applicants' patent. The answer to this question was in the affirmative. The next question was whether or not the purchaser from the patentee is an innocent purchaser for value without notice of the fraud. The court cited the familiar rule stated in the case of *Dead River Fishing and Hunting Club v. Stovall*[34] in the following language: "A purchaser of land is charged with notice not only of every statement of fact made in the various conveyances constituting his chain of title, but he is also bound to take notice of and to fully explore and investigate all facts to which his attention may be directed by recitals in said conevyance contained." Holding then that where the statute required the filing of an application under oath and the giving of information called for therein as a condition precedent to the right to obtain a patent to land forfeited to the state for taxes, such application constituted a part of the patentee's muniment of title of which applicant's subsequent purchaser was charged with notice. The answer to the second question is then that the purchaser from the patentee was not an innocent purchaser for value without notice, and was entitled to no protection on that grounds. The state was held to be entitled to a cancellation of the patent, and to a cancellation then of the deed as a cloud upon its title.

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[30]56 Miss. 776 (1879).
[31]188 So. 314 (Miss. 1939).
[32]Miss. Laws 1936 c. 174.
[33]188 So. 551 (Miss. 1939).
[34]147 Miss. 385, 113 So. 336 (1927).

In the case of *Mortimer v. Curle*[35] there is a construction of the statute[36] which requires applications for tax patents to be filed in the order received and given a serial number, and authorizes the Land Commissioner to fix the price of land with the approval of the governor, and to sell the land with the approval of the governor. It was held that the statute does not require the Land Commissioner to sell to the first applicant and that an applicant does not become entitled to a patent until the price has been fixed and the sale has been actually made with the approval of the governor. It was held that an applicant who filed his application prior to that of the applicant to whom a patent was issued obtained no interest in the land and no equitable right or title merely by the filing of his application. Accordingly, when a patent was subsequently issued to this first applicant such patent was of no force and effect, because the officials issuing the same were without power to do so, having previously issued a valid and binding patent to another who paid the purchase price and received delivery.

B. Special Taxing Districts

Abiaca Drainage District v. Albert Theis & Sons, Inc.,[37] was a suit by certain bondholders of the drainage district for mandamus to compel the commissioners of the district to apply funds on hand to the payment of their bonds, and to levy a sufficient tax on the land benefits of the district to pay the balance remaining due thereon. Defendant plead in abatement the pendency of another suit in the Chancery Court of the same county, in which suit the same and other questions were involved, and to which suit all of the bondholders were made parties. In the trial court the plea in abatement was demurred to, demurrer sustained, and the bill dismissed. After stating that there can be no preference among bondholders of an insolvent drainage district, but that they must all share *pro rata* in the assets, the Supreme Court pointed out that if the judgment of the trial court were sustained it would work such a preference in favor of the parties to this suit; and that inasmuch as there was another suit pending wherein all the bondholders are parties, and wherein the question of the solvency of the district may be determined, as well as other matters, this suit should be dismissed. Mandamus to compel payment of bonds and levy of taxes is too narrow an action for proper settlement of the questions involved, said the court.

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[35]183 Miss. 17, 183 So. 485 (1938).
[36]Miss. Laws 1936 c. 174, §§ 4, 5.
[37]187 So. 200 (Miss. 1939).

There are two suits styled *Waits v. Black Bayou Drainage District*,[38] both involving the same subject matter, and presenting somewhat the same questions, except that in the first suit the decision on another point prevented a decision being made on the main point, and it took the second suit to settle the matter. The land involved in the suit was situated in the Black Bayou Drainage District. In 1931 it was sold to the state for 1930 state, county, and drainage taxes. Waits patented the land from the state in 1934. The drainage district filed its bill in the Chancery Court of Washington County to recover the drainage taxes assessed against the land for the years 1931 to 1935 inclusive, and to enforce the lien given by the drainage statute for payment of the taxes. The question to be determined was whether the drainage taxes accrued against the land while the state had title, and whether when the state parted with title the land again became charged with drainage taxes for those years. When this suit got into the Supreme Court the question was raised for the first time at to whether or not the Chancery Court had jurisdiction of it. Citing the drainage statutes[39] for authority, the court held (1) that drainage taxes are a charge against the land only, and that there is no personal liability upon the land owner therefor, and (2) that the statutes providing the method for assessment and collection of drainage taxes provide an exclusive remedy. It was held therefore that neither the chancery nor the circuit court has jurisdiction of suits to recover drainage taxes. Accordingly the bill was dismissed in the Supreme Court.

Then when the commissioners of the Drainage District undertook to have the sheriff sell the land to collect according to the regular method the taxes which they contended accrued while the land was in the state, Waits filed his bill in the Chancery Court to enjoin the commissioners from having such a sale, and the question was squarely presented as to whether or not the land was charged with those taxes. The holding is to this effect: That though taxes accruing on drainage district land are held in abeyance during the time land is held by the state under a tax sale, the taxes do accrue, subject to the state's superior right, and when the state parts with its title the land is not freed from the lien for drainage taxes until they are paid in full, and proceedings may be had under the statute to collect assessments levied during the time when the state held title. The decision rests squarely upon the construction of the applicable statutes.[40]

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[38]185 So. 577 (Miss. 1939); 189 So. 103 (Miss. 1939).
[39]Miss. Code Ann. (1930) §§ 4448-4468.
[40]Miss. Code Ann. (1930) §§ 4469, 4470, 4488, 4502.

C. Excise Taxes

(1) Unemployment Compensation Contributions.

The cases of *Texas Company v. Wheeless*,[41] and *American Oil Company v. Wheeless*[42] have to do with the unemployment compensation act,[43] and the question of whether or not non-resident oil companies having bulk-station dealers in this state are liable under that act for contributions to the compensation fund based upon a percentage of the salaries or commissions received by their dealers and those employed in aiding the dealers in distributing their products. The decision finally rests in each case upon the terms and the construction of the contract between the company and the dealer. Much familiar law on the subject of master and servant and independent contractor is cited and discussed. In the instant cases it is decided that the relationships existing are not those of master and servant, and that the contracts between them are not "contracts of hire" within the meaning of the statute. The appellants are held, therefore, not to be liable for the contributions. Interesting to note is that the Supreme Court holds these contributions to be imposed upon the employer as an *excise tax*, and states the rule with reference to excise taxes to the effect that doubts about the application of statutes imposing such taxes are to be construed against the taxing power and in favor of the taxpayer.

(2) Sales Taxes.

In *Stone v. Rogers*[44] the appellee was a cotton ginner who paid under protest 2% taxes upon sales[45] of cotton-seed meal to his customers, and he sought to recover back those payments on the grounds that the transactions were not sales of cotton-seed meal, nor even exchanges or barters of cotton seed for meal, but that the true nature of the transactions was one of agency so far as the ginner was concerned; that he simply acted as the agent of the farmer to send his cotton-seed to the oil mill for him and get back meal. The court repeated the rule about excise taxes being strictly construed against the taxing power, saying that the power cannot be implied and that all doubts must be resolved in favor of the taxpayer. But after scrutinizing the factual situation here carefully the court determined that there are no doubts that the transactions were sales or barters, and the tax-gatherer kept the money.

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[41]187 So. 880 (Miss. 1939).
[42]187 So. 889 (Miss. 1939).
[43]Miss. Laws 1936 c. 176. 42 U. S. C. A. § 1101.
[44]189 So. 810 (Miss. 1939).
[45]Miss. Laws 1934 c. 119 §§ 1, 2 (c).

In *Stone v. Martin Veneer Corporation,*[46] the appellee recovered back from the Chairman of the State Tax Commission money which it had paid under protest as taxes imposed under the sales tax statutes.[47] The appellee was engaged principally in the business of manufacturing wooden veneer and wooden plugs, but had sold some logs which it claimed had been cut off its own land but which were unsuited for its own uses to another manufacturer. The case turned upon an application of the language of the statute, to the facts, as to whether or not the appellee was engaged principally in the business of felling and producing timber for sale, profit or commercial use. The court found that the logs sold, upon which sale this tax was collected, were sold as a mere incident to the appellee's business, and the judgment of the trial court allowing the appellee to recover his money was affirmed.

D. Income Tax

There are two cases on the state income tax laws. *Mississippi Cotton Seed Products Company v. Stone*[48] is a case where the appellant had been assessed with income tax upon its income from loans to persons from whom it bought cotton-seed. The appellant contended that since it was a foreign corporation, authorized to do business in Mississippi but not domesticated, the plain language of the statute exempted it from payment of the tax sought to be imposed. The language referred to is this: "—provided, income from money loaned by nonresidents or foreign corporations or citizens of a foreign country, shall not be included as taxable income."[49] The Supreme Court held that this is a case where the legislature did not say what it meant to say, and the word "by" is changed to the word "to" by the court, in order to give the statute its intended meaning. "From a reading of the entire statute it is manifest that it was the purpose of the legislature to place domestic and foreign corporations upon the same basis," said the court. It was not intended that foreign corporations should be exempt from the tax, when domestic corporations doing the same kind of business and receiving the same kind of income would be taxed thereon. To give the statute that construction would raise a doubt as to its constitutionality.

State v. Morgan Gin Company[50] is a suit brought by appellee under authority of Section 5057, Code of 1930, to cancel an additional assessment for income tax, based on the refusal of the State

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[46]183 Miss. 712, 184 So. 435 (1938).
[47]Miss. Laws 1934 c. 119 § 2(a); Miss. Laws 1936 c. 158 § 2.
[48]184 So. 428 (Miss. 1938).
[49]Miss. Laws 1934 c. 120 § 11, 1(a).
[50]189 So. 817 (Miss. 1939).

Tax Commission to approve a deduction of about fifteen thousand dollars paid to the gin's customers under a co-operative agreement. The case turned upon a definition of the word "income", and it was pointed out that there is a distinction between "gross receipts" and "income". Were the gin had an agreement with its customers to make equitable adjustments and refunds to them of moneys previously paid by them for gining their cotton, on a co-operative basis, then it was held that the money received by the ginner which it was not entitled to retain, but must under the agreement refund, was not income, and should not be taxed.

E. Miscellaneous

Hartsfield v. Lafayette County[51] was a suit wherein a former sheriff of the county sought to collect a balance of money alleged to be due him as commissions on taxes collected by him during the months of January and February of 1928. The difficulty grew out of the fact that the legislature changed the statute in April of 1928,[52] undertaking to put the sheriffs upon a calendar year basis, so that commissions would be figured on collections commencing January 1st rather than commencing October 1st as theretofore. It was provided that the Act should operate retrospectively, that is, should take effect as of January 1st, 1928. Pointing to Section 96 of the Constitution of 1890, wherein it is provided that the legislature shall never grant extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, after service rendered or contract made, the court held that in so far as the new act undertook to operate retrospectively it was unconstitutional, as it would to that extent increase the amount which the sheriff was entitled to receive at the time he performed the services.

Mississippi Road Supply Company v. Hester[53] was a suit brought by the appellee as "a resident citizen of Copiah County, Mississippi, and a property owner and taxpayer in said county, and also a qualified elector therein", seeking to recover from the appellants money alleged to have been illegally paid to them by the Board of Supervisors on account of rent or purchase of certain road machinery. Appellee did not state in his bill that he brought the suit on behalf of all the taxpayers of the county, nor invited them to join in the suit; the court held that this was one of the defects of the bill. But it is plain that the appellee proceeded upon the theory that any taxpayer had the right to challenge the legality

[51]189 So. 177 (Miss. 1939).
[52]Miss. Laws 1928 c. 87.
[53]188 So. 281 (Miss. 1939).

of payments out of the public funds, and sue to recover them if he deemed the payments illegal. In a long opinion, well fortified with citation of authorities and quotations from the statutes, the court held that there is no authority outside of statutory authority for the bringing of a taxpayers suit of this nature. Then reviewing the statutes the court found that except in certain specific instances a taxpayers suit will only lie when the money is spent for an object not authorized by law; and there is no authority for such a suit where the money is spent for a legal object, although spent contrary to statutory directions. Quoting from the opinion, "Taxpayer's suits should not be authorized merely because a taxpayer conceives that public authorities are acting unadvisedly and improperly or in his judgment illegally, but the facts set forth in the bill must show that the funds for the contract involved are not authorized by law." After observing that the statutes have provided for officers whose duties are defined by law, who are to bring suits in proper cases in behalf of counties, state, and other public bodies, the court holds that there was no authority for the bringing of this suit, and that it would not therefore be proper to deal with the merits of the suit. The bill was dismissed.

X.

TORTS

*C. Sidney Carlton**

The scope of this paper will be somewhat restricted because of the limitations of space imposed by the Journal, as well as by the inexperience of the writer. No attempt will be made to discuss each case considered by the Supreme Court during the past year, but an effort will be made to point out the tendencies and the trends shown by the decisions.

The first, and probably the most important, observation to be made from a consideration of the cases, is that the most cited and most important legal treatise used in the determination of tort cases in the Supreme Court, is the Restatement of the law of Torts.[1] It should not be understood from this statement that the Mississippi Supreme Court will, or does, agree at all times with the law as codified by the American Law Institute's Committee, but, in the absence of prior *contra* decisions, a section of the Restatement directly in point with the case at bar will likely control the result. The Restatement was cited in a large portion of the cases

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[1]RESTATEMENT, TORTS (1934).

studied in the preparation of this article and in several it was noted that the principles laid down in various sections by the committee were given as the controlling authority for the particular result reached. This is true of the cases of *Taylor v. Standard Oil Co.*[2] *and Yazoo & M. R. R. v. Gordon,*[3] and the cases are particularly interesting from this standpoint.

Another interesting, and perhaps significant, trend is shown by the large percentage of master and servant cases which reached the Supreme Court, the number of which is increasing yearly, as will be seen from a numerical comparison covering the past few years. This development, of course, is to be expected as our state becomes more industrialized and as our public policy is directed toward the encouragement of commercial enterprises. Much food for thought is furnished by the query: "Is this increase due to greater industrialization or to the outmoding or antiquation of our judicial system for dealing with the questions presented by such cases?" It will probably be admitted by all persons concerned in this class of cases that some revision of the existing laws relative thereto is needed. The prime question is as to what form such legislation should take. The writer is of the opinion that one consideration which can ill be overlooked is the fact that our Supreme Court, composed of only six justices, is able to handle a limited number of appeals. In order to avoid serious congestion of our court's docket, care must be taken that the litigation requiring the consideration of the court, be limited to a degree which will avoid the submission of more cases than can be disposed of with facility. If the litigation involving master and servant principles is to continue to increase, and agriculture is to be balanced with industry, it is quite possible that some plan different from that used at present must be formulated for the disposal of such cases, or that the personnel of the court must be increased.

The case of *Holmes v. T. M. Strider & Co.*[4] is important in view of the large amount of construction work now taking place upon the highways of the state. In this case, the court held that no acceptance by the Highway Department of work done under its supervision could release the contractor of his liability to the general public for damages ensuing from his negligence. This is true by reason of an exception imposed by the court on the rule that:

> "after the contractor has turned the work over and it has been accepted by the public board or commission as satisfactory, the contractor incurs no further liability

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[2]186 So. 294 (Miss. 1939).
[3]186 So. 631 (Miss. 1939).
[4]189 So. 518 (Miss. 1939).

to third parties, by reason of the condition of the work, and that the responsibility, if any, for maintenance or using it in its defective condition, is shifted to the public board or commission".[5]

The exception is that: "Where the work is a nuisance per se, *or where it is turned over by the contractor in a manner so negligently defective as to be admittedly dangerous to third persons*", an acceptance by the public board or commission will not release the contractor from liability to one of the general public.

After detailed consideration of the case of *Kramer Service, Inc. v. Wilkins*,[6] the writer is of the opinion that although the result reached was correct under the evidence in the case, certain language used therein might be easily misconstrued and lead to misunderstanding by the bench and bar. In this case, a business guest of a hotel operated by the appellant suffered a trauma from glass falling from a transom. The wound failed to heal, and cancer developed at the point of the cut. The medical testimony in the case was conflicting. One expert testified that it was possible for a cancer to develop from such injury, the chances being about one in a hundred. Another expert testified that there was no connection between trauma and cancer, saying in support thereof that if there were such connection almost every person of mature age would be suffering with cancer. The fallacy of such reasoning is evident as will be seen by the following illustration. Thousands of persons might suffer negligent injuries of minor degree, causing loss of blood, without causing loss of life, but if one person suffering from the disease of haemophelia is negligently injured to an extent which would be slight in a normal person, but which injury caused his death, the actor inflicting such injury would be liable for the death. In other words, the mere fact that a given injury ordinarily does not produce serious results is no defense to an action demanding large damages because the condition of the injured was such that the injury in fact produced greater damage. The record in this case is pointedly silent with reference to whether or not the trauma did, or it was the opinion of a medical expert that it did, cause the cancer. Hence the appellee's case must fail because of his failure to meet the burden of proof. It might be argued, however, that in view of the fact that medical science has not yet ascertained the cause of cancer, together with the fact that the trauma never healed, but after some time the particular wound became cancerous, the jury was warranted in finding that the trauma did in fact cause the injury, especially so in view of the

[5]Holmes v. T. M. Strider & Co., 189 So. 518 (Miss. 1939).
[6]186 So. 625 (Miss. 1939).

fact that the medical testimony in the record was to the effect that the cancer could have been caused from the trauma. It is easily seen, however, that, without regard to the opinion rendered in the case, if the appellee should introduce competent testimony that the cancer was caused by the trauma, upon the retrial of the cause on the issue of damages, recovery might be had for the damages occasioned by the cancer. It seems that the decision would have been more easily understood had the court stressed the failure of the appellee to meet the burden of proof as imposed upon him by law.

Two other cases, *Biedenharn Candy Co. v. Moore*[7] and *Blount v. Houston Coca Cola Bottling Co.*,[8] are worthy of comment because they contrast the two theories upon which liability may be predicated for the sale of defective food or drink. In each case, the plaintiff suffered injury because of drinking a Coca Cola containing part of the body of a mouse or a small bird. The *Blount* case was predicated upon a negligence theory. The *Moore* case was predicated upon an implied warranty theory. The result reached in each case was the same. The implied warranty theory imposed liability if injury was had because the food or drink was in fact injurious or defective. The negligence theory, under the decision in the *Blount* case, makes liability a question for the jury, if, by reasonable care on the part of the defendant, the deleterious condition of the food or drink should have been *discovered* by the use of due and reasonable care, even though all possible care had been used to *prevent* any injurious substance from entering the food or drink. The court held that the proof of impurity or unfitness of the drink involved in the *Blount* case brought it within the principles of the doctrine of *res ipsa loquitur*. Thus, it would seem that the two theories are closer together in result than heretofore.

The writer expresses the opinion that the tort cases presented to the Supreme Court during the past year have been handled by it in a most satisfactory manner and in close accord with the previous principles announced by the court. No cases were presented which raised any new problems of difficulty, but the value of the adherence to precedent by the court cannot be overestimated.

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[7]186 So. 629 (Miss. 1939).
[8]185 So. 241 (Miss. 1939).

XI.

WILLS, PROBATE, AND TRUSTS

*William I. McKay**

A. Wills

Balfour v. Wells[1] involved the determination of the effect of a devise of land "to my daughter, during her natural life, and at her death it shall descend to her children". It was held to be a devise of a remainder to class vesting at testator's death in the only member of class then in being so that the widow of the predeceased son of the life tenant took to the exclusion of the heirs of the testator.

In *Warren v. Sidney's Estate*,[2] a proceeding to establish a lost or destroyed will, the court held that the will was established by corroborative statements of the testator, the testimony of one subscribing witness, and the fact that a copy of the will had been mailed to a certain bank, as testified by the subscribing witness. Testimony by the other attesting witness that he had no recollection of having signed the will was attributed to a lapse of memory in view of the positive evidence to the contrary. In regard to the evidence the court held that the burden of proof of the legal execution, contents and loss or destruction of a will is upon the proponents, and the contents must be shown by the clearest, most convincing and satisfactory proof. It was held further that secondary evidence may be used only where proof by attesting witness is not available and that declarations of the testator are competent only in corroboration of other competent evidence of the contents and execution of the will. The court aligned itself with the authorities supporting the proposition that the state under its right of escheat or as *parens patriae* for possible unknown heirs, may contest the probate of a will.

In *Smith v. Smith*,[3] involving the contest of a will, it was held that contestant's motion to amend the petition to conform to the proof should have been allowed without condition either of continuance for further proof or of payment of costs to that time. An instruction which tended to indicate that the issue for determination was whether the alleged testator was insane was held misleading, since some of the jurors may have thought him lacking in testamentary capacity and at the same time not insane within the ordinary acceptation of that term.

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[1]183 Miss. 707, 184 So. 313 (1938).
[2]183 Miss. 669, 184 So. 806 (1938).
[3]188 So. 305 (Miss. 1939).

In *Eatherly v. Winn*,[4] the court held that in view of Sections 1643, 1675, 3122, 3229, Code of 1930,[5] the estate and not the devisee of land should pay taxes on the land for the year preceding death of testatrix, notwithstanding a decision to the contrary by the umpire under the will to arbitrate controversies of policy between executors. The taxes are to be paid out of personalty even to the defeat of specific or residuary legatees, and a devisee paying these taxes is not a volunteer and is entitled to reimbursement. The devisee was held entitled to rents for year of death of testatrix prior to April under a will that land should go to the devisee immediately on probate of the will, notwithstanding Section 1643, Code of 1930.[6]

B. Probate

In *Farrell v. McCutcheon*,[7] the following situation was presented: On Feb. 26, 1934, M gave his note to F for $581.47, due in one year, with 6% attorney's fee if not paid at maturity and placed in the hands of an attorney for collection. Default was made and the note was placed in the hands of an attorney. M died before payment. F probated the note, the clerk inserting in the statutory affidavit the amount of the claim as $581.47, only the principal. M's executors refused to pay any part of the interest or attorney's fee. In the suit the court allowed accrued interest, the provisions of the note controlling the clerk's erroneous insertion;

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[4]189 So. 99 (Miss. 1939).

[5]Miss. Code Ann. (1930) § 1643: "The goods, chattels, personal estate, choses in action, and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real or personal, or otherwise, and the rent of lands accruing during the year of his death, whether he died testate or intestate, shall be assets, and shall stand chargeable with all the just debts and funeral expenses of the deceased, and the expenses of settling the estate; and the lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed."

§1675: "An executor or administrator shall pay all taxes that may be due on real and personal property belonging to the estate."

§3122: "Every lawful tax assessed, levied or imposed by the state, or by a county, municipality or levee board, whether ad valorem, privilege, excise, income, or inheritance, is a debt due by the person or corporation owning the property or carrying on the business or profession upon which the tax is levied or imposed, whether properly assessed or not, or by the person liable for the income, inheritance or excise tax, and may be recovered by action, and in all actions for the recovery of ad valorem taxes the assessment roll shall only be prima facie correct."

§3229: "On receipt of the assessment rolls the collector shall immediately proceed to collect the taxes, adding the county tax due by each person to his state tax, and collecting all together; and it shall be the duty of every person assessed to pay his taxes to the collector on or before the fifteenth day of December.

[6]Miss. Code Ann. (1930) § 1643, *supra* note 18.

[7]183 Miss. 50, 183 So. 386 (1938).

but held that the probate, being silent was not sufficient to entitle the claimant to the attorney's fee. However, recovery was allowed for the attorney's fee, without probate, on the ground that liability therefor had accrued again after probate because of the refusal of the personal representatives to pay the accrued interest.

In *First Nat. Bank & Trust Co. v. Landau,*[8] the court held that Section 2295, Code of 1930, limiting actions against executors and personal representatives to four years from date of qualification should be applied to the guardian of a person *non compos mentis.* The decision was based on the fact that Section 1902, Code of 1930, provides that all laws relating to executors and administrators should be enforced as far as applicable in the guardianships enumerated therein.

In regard to funeral expenses as affected by the rules of probate and the statute of limitations the court held in *Tom E. Taylor Undertaking Co. v. Smith's Estate,*[9] that such expenses need not be probated, reaffirming prior holdings. It added that the statutes of limitation do not run against such claims as long as the estate is open; in this respect they are similar to other expenses of administration.

In *Re Burkett's Estate*[10] a claim for care and nursing rendered the decedent was probated and allowed. On appeal the court held that in the absence of an express promise, the claimant must prove rendition of services with expectation of compensation and acceptance thereof with knowledge or duty to believe payment expected. As between near blood relatives, or members of the same household the inference is that personal services are free, and such presumption will prevail unless overcome by evidence. The court held that there was no evidence of claimant's intention to demand compensation, she having stated that it would not cost the deceased a a cent to live with her, and on one occasion having declined an offer of compensation.

In *Martin v. De Jarnette,*[11] the court held that the burden is on the claimants to establish their claim by a preponderance of the evidence and affirmed the chancellor's finding that the burden had not been met. A claim for a doctor's bill incurred by the deceased in his last illness was denied on the ground that such claim should be probated on the affidavit of the original creditor and not on proof made by the claimant alone as a voluntary payor.

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[8]183 Miss. 651, 184 So. 618 (1938).
[9]183 Miss. 45, 183 So. 391 (1938).
[10]186 So. 834 (Miss. 1939).
[11]187 So. 202 (Miss. 1939).

In *Daniel v. Hodge*,[12] after the plaintiff had previously sued unsuccessfully claiming compensation for services to decedent, the executrix of the estate wrote a letter promising to pay commission for the services previously rendered in the event that a certain lease was completed. The court held that the executrix, having signed the letter with full knowledge of the facts, became personally liable to pay the commission.

In *Townsend v. Beavers*,[13] the heirs had been brought into court in response to the administrator's petition to sell lands to pay debts and a decree *pro confesso* and a final decree thereon taken against them. It was held that they could not subsequently contest the administrator's account on the question of legality of probate of any of the debts which were set up in the previous petition to sell lands. If the time to probate has elapsed, only probated debts are legal; and the petition to sell land to pay debts presents to heirs or devisees who have been made parties, the issue of their legality, and a decree of sale is final as to such issue in subsequent litigation. In such a proceeding, the requisite parties are heirs, devisees or their conventional vendees, mortgagees or assignees; and their judgment creditors are not necessary. The court further held that under Section 1671, Code of 1930, the payment of unprobated debts by a personal representative with the consent of the heirs or devisees is conclusive on those consenting; but under Sections 1671 and 1674 the court has no power to authorize personal representatives to pay unprobated debts.

The court in *Cooper v. U. S. F. & G. Co.*[14] held that collection by a successor administrator at greater expense does not make the surety of the preceding representative liable for such increase in expense of collection. The lawful distributee cannot recover from a former personal representative and surety, attorney's fees expended to recover money received by the former representative before appointment and by others as false distributees on the advice of the original representative, who was an attorney, that the false distributees were entitled to the money.

C. Trusts

In *Yandell v. Wilson*,[15] W delivered to a bank in trust for his daughter and granddaughter some first mortgage notes payable to him or bearer. For several years thereafter in many significant ways he recognized and confirmed the trust; yet he finally, with-

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[12]187 So. 544 (Miss. 1939).
[13]188 So. 1 (Miss. 1939).
[14]188 So. 6 (Miss. 1939).
[15]182 Miss. 867, 183 So. 382 (1938).

out the knowledge of the beneficiaries, destructively subordinated the security of the notes in favor of obligations to innocent third persons, and otherwise assumed control and possession of the notes.

To the contention that the attempted creation of a trust was abortive because the bank lacked the capacity to be trustee, the court replied that equity would not permit the trust to fail for such want of a trustee. It was also held that where one makes a completed gift or creates a trust irrevocable, his dealings with the trust property thereafter are as trustee for the beneficiaries; and that a suit by the beneficiaries against the executors of the trustor's will and estate on his liability as trustee is governed by the ten year statute of limitations.

In *Smith v. Taylor*,[16] the court held that Section 2111, Code of 1930, avoids oral gift of estate in land for a term of more than one year; and Section 3348 avoids a declaration of trust of land not in writing, signed, acknowledged and lodged for record. Also, the mere deposit of money in bank by father in the name of a son is not sufficient as a gift, especially in view of subsequent control of funds by father.

Dogan v. Cooley[17] presented an interesting problem which gave rise to divergent views and opinions on the part of the court. A wife, a merchant, proposed to buy a tract of land for $500 in cash and the remainder in mortgage notes. Being told that any record indebtedness by her for the land would unfavorably affect her mercantile credit, she had the deed, notes and trust deed made in the name of her husband, she paying the cash and the notes. The land became the homestead of the husband and wife, and while such, a judgment was recovered for an antecedent debt against the husband and execution was levied on the land. The wife enjoined the sale and prevailed in the lower court on the theory that the husband was merely a trustee for his wife. The controlling opinion, reversing the decree, held that there was no trust in favor of the wife, on account of Section 1944, Code of 1930, governing conveyances between husband and wife; and that the saving clause in Section 3348 does not operate because all of the purchase money was not paid or agreed to be paid by the wife at the time of the conveyance.

Justice Griffith concurred in the holding against a resulting trust and added that the wife was barred of relief by her fraud in having the title placed in her husband. No one of her creditors was complaining.

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[16]183 Miss. 542, 184 So. 423 (1938).
[17]185 So. 783 (Miss. 1939).

Justice McGehee was in doubt on the question of a resulting trust but was inclined in its favor.

Chief Justice Smith dissented, Justice McGowen concurring, contending that the husband was trustee for the wife. He argues that Section 1944 has no application because the trust does not rest on a transfer by the husband to the wife; and that Section 3348 does not interfere with resulting trusts.

In *Landau v. Landau,*[18] plaintiff had received money from his father in Germany and deposited it in his own account. Arrangements were being sought whereby the father could leave Germany and satisfy consular authorities that he would not become a public charge on entering this country. Plaintiff wrote to defendant, uncle of plaintiff, saying that he would turn over to defendant the money which plaintiff had "subject to my disposition". Defendant received the money which plaintiff now sues to recover. Defendant claims that he applied the money to an indebtedness owed him by the plaintiff's father in Germany, and asserts that the money was that of the father and was being held by plaintiff as trustee, and that consequently defendant is entitled to apply the father's money in payment of the father's indebtedness to defendant. The court held that in view of the fact that the evidence disclosed an unrestricted authority of use and disposition conferred on the son, the son was not a trustee for his father. Also it was held that alleged statements by the plaintiff that he got the money "for his father's account", "it was his father's money", were too loose and equivocal to denote the existence of a trust.

In *Devall v. Farris,*[19] the defendant obtained a deed of trust from the complainants covering two tracts of land, one of which had been previously purchased by a bank at a foreclosure sale, by agreeing to purchase that tract from the bank for the complainants. The defendant thereafter purchased the tract but made no tender of deed thereto to the complainants. It was held that the defendant held title in trust for complainants and was entitled to reimbursement for only purchase money, interest, and proper expenditures on land.

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[18]187 So. 224 (Miss. 1939).
[19]189 So. 516 (Miss. 1939).

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News of the School:

Dr. Charles W. Taintor has succeeded Dr. Wex S. Malone, resigned, as Professor of Law at the University of Mississippi. Dr. Taintor has formerly taught at Louisiana State University Law School and the University of Nebraska Law School. Dr. Malone has accepted a position at Louisiana State University.

MISSISSIPPI LEADING CASES

THE TRIBETTE CASE

*T. C. Kimbrough**

In 1881, Prof. J. N. Pomeroy,[1] published and gave to the judicial world his monumental *Treatise on Equity Jurisprudence*, which from the first, produced a profound impression upon the bench and bar of this country and upon all English speaking countries as well. This work ran through four editions.

The elder Pomeroy died almost immediately after the first edition had left the press, but by means of a testamentary provision, he required his sons to edit subsequent editions when necessary. This request resulted in new editions down to the fourth in 1918, which is the last.

This paper is concerned only with that part of Pomeroy's treatise, having to do with bills of peace and multiplicity of suits, and more particularly with Section 269.

Mr. Pomeroy's discussion of this phase of his work was occasioned by, and grew out of, the vague statements and dicta found in many cases to the effect that equity will interfere and take cognizance of a matter to prevent a multiplicity of suits, but, he found uncertainty, and in many cases incompleteness of judicial determinations and much of conflict of opinion in the decided cases.

The courts at the time were at decided variance as to the particular classes of cases in which a court of equity would be empowered to exercise jurisdiction and administer relief. In the words of Pomeroy, "they seem also to be unsettled even with respect to the meaning, theory or *rationale* of the doctrine itself as a foundation of their jurisdiction."[2]

He then proceeds to give the classes by which the extent and limitations of the doctrine may be determined.

He reduces the conditions for the exercise of equity jurisdiction to prevent a multiplicity of suits to four classes, namely:[3]

"1. Where, from the nature of the wrong, and from the settled rules of legal procedure, the same injured party, in order to obtain all of the relief to which he is justly entitled, is obliged

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[1]Professor of Law, Hastings College of Law, San Francisco.
[2]1 POMEROY, EQ. JUR. (4th ed. 1918) § 244.
[3]1POMEROY, EQ. JUR. (4th ed. 1918) § 245.

to bring a number of actions against the same wrongdoer, all growing out of the same wrongful act and involving similar questions of law and fact. To this class belongs nuisance, waste, continued trespass and the like.

"2. Where the dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions against A, all depending upon the same legal questions and similar issues or fact etc. A familiar example of this branch is ejectment suits etc.

"3. Where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons suing uniting as co-plaintiffs, or one of the persons, suing on behalf of the others, or even by one person suing for himself alone, etc.

"4. Where the same party, A, has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as co-defendants."

The purpose, of course, here, was to confine or consolidate all the suits in one equitable suit, this suit being substituted for all other judicial proceedings and in this way the entire controversy fully and finally settled and the rights of all parties adjusted in the one suit in equity.

Pomeroy was not the originator of this doctrine but he certainly was the expander of it. It was not entirely new to him, but was suggested to him from a survey of all the cases from the earliest times dealing with bills of peace and multiplicity of suits.

The earliest instances of the exercise of such a jurisdiction or power to prevent a multiplicity of suits is found in what is known as "bills of peace."

Bills of Peace as the name indicates are bills filed to prevent the "vexatious recurrence of litigation" affecting a party's right.[4] Mr. Story in somewhat different language says, "These bills were to procure a repose from perpetual litigation."[5]

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[4] ADAMS, EQ. (7th ed. 1881) 199.
[5] 2 STORY, EQ. JUR. (9th ed. 1866) § 853.

They illustrate the exercise of chancery jurisdiction for the avowed purpose and upon the ground, of preventing a multiplicity of suits. We find these bills were divided into two kinds. To the first class belonged the bills brought to establish one general right between a single party on one side and a great number of persons on the other, where such rights could not be determined by several suits between the different parties. The second class was where bills were brought between two parties to prevent further litigation of a right after it has been satisfactorily established by one or more trials at law.[6]

The bills of the first class, originally, required as a basic ground for jurisdiction that there be present in the subject matter of the controversy, a common interest or title from which all of the claims arise and from which all the issues arise; it is not sufficient, the claims of each individual being separable and distinct, that there is a community of interest merely in the question of law or of fact involved or in the form and kind of remedy demanded and obtained by or against each individual.[7]

Bills of peace were allowed at times in cases, where one party claimed a right which was contested by many, such as, a controversy between the lord of a manor and his tenants in which the lord sought to establish the question of the right of common.[8]

Lord Nottingham observed that the issues, such as in this case, would ordinarily be tried at common law, but equity took jurisdiction to prevent a multiplicity of suits. Here it will be observed that there was a common title and privity between the parties. A case very much like the above case is *Brown v. Vermuden*,[9] where the vicar of a parish brought suit to establish and determine what tithes were due him by certain lead-miners.

An interesting case to be found in the books is the often quoted case of *Mayor of York v. Pilkington*.[10] In this case although there was considerable argument to the effect that there must be privity between the numerous parties, apparently this theory was re-

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[6]ADAMS, EQ. (7th ed. 1881) 199, 200; BISPHAM, PR. EQ. (5th ed. 1893) 415; 2 STORY, EQ. JUR. (9th ed. 1866) 854, 859.

[7]1 POMEROY, EQ. JUR. (4th ed. 1918) § 269; ADAMS, EQ. (7th ed. 1881) 199; 2 STORY, EQ. JUR. (9th ed. 1866) 855, *et seq.*

[8]How v. Tenants of Bromsgrove, 1 Vern. 22, 23 Eng. Rep. 277 (1681). For other similar earlier cases, see 2 AMES, CASES EQ. (1929) 55 n. 1, involving suits by many tenants against the lord as well as by the lord against many tenants.

[9]1 Ch. Cas. 272 (1676).

[10]1 Atk. 252, 26 Eng. Rep. 180 (1737). Other cases which might be read with profit are: Cockburn v. Thompson, 16 Ves. 321, 33 Eng. Rep. 1005 (1809); Phillips v. Hudson, L. R. 2 Ch. App. 243 (1867); Robertson v. Hartopp, 43 Ch. D. 484, (C. A. 1888).

jected, but privity looms large as a factor in the mind of the ancient equity judge. Formerly, in bills of interpleader it was necessary to allege and prove privity between the parties interpleaded.

Lord Chancellor Hardwicke was at first inclined to allow the demurrer which was interposed to the bill in the *York* case and said: "There is no privity at all in the case but many distinct trespassers in this separate fishery; besides, the defendants may claim a right of a different nature, some by prescription, others by particular grants, and an injunction here would not quiet the possession."

"It is more necessary, too, in this case there should be a trial at law etc." On reargument his lordship changed his mind and said: "but the question is whether the plaintiffs have a *general right* to the sole fishery, which extends to all the defendants." This ground upon which he puts his decision is quite different from his first holding on the demurrer.

In the case of *Dilly v. Doig*,[11] the owner of a copyright sought a bill of peace against two booksellers, who were selling the same spurious edition. Want of privity worked a denial of the bill of peace it was alleged, but the court did not mention the presence of the independent equitable ground of an injunction against infringements of copyrights. The basic issue here being equitable, the demurrer should have been overruled.

At about the time of the *York* case, an injunction was refused in the case of *Lord Tenham v. Herbert*,[12] where the facts were very similar to that case, except that the claim of exclusive right to a fishery was denied by only a single person.

In these cases, the decisions were expressly based on the principle of a bill of peace to prevent an unnecessary multiplicity of actions to determine an issue which could be in one suit in equity.

Prior to the publication of Professor Pomeroy's work on *Equity Jurisprudence*, it was thought to be a requisite to the equity of a bill which rested solely upon the ground of preventing or enjoining a multiplicity of actions at law that there should be some mutuality among the multiple complainants or defendants, as the case might be, as to the subject matter of the suit; that a mere common interest or mutuality as to the facts and law, in the many cases, was not sufficient.

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[11] 2 Ves. 486, 30 Eng. Rep. 738 (1794). In Gains v. Chew, 2 How. 619, 11 L. ed. 402 (1844), McLean, J., said he saw no difference in principle between the use of this remedy to protect the exclusive right of an author and its use to protect the exclusive right of a fishery.

[12] 2 Atk. 483, 26 Eng. Rep. 672 (1742).

It will be seen by a reading of his text that Professor Pomeroy, after stating the foregoing rule announced in the text books on the subject, and in many, if not all, the adjudicated cases on the subject, proceeded to state another rule, namely, that there is a class of cases in which a mere community of interest in the questions of law and of fact involved in the controversy is sufficient to justify equity in taking jurisdiction and settle, in one suit, the several controversies.

The opposing doctrine is to the effect that all of the cases cited by Pomeroy in his text, which include the foregoing cases, rested the ultimate decision on independent equities present, as disclosed by the facts.

Section 269 of Pomeroy's work declares positively this doctrine which heretofore, if it existed, had not been brought out in the open, namely, that where "a numerous body of separate claimants" are aligned "against a single party, or on behalf of a single party, against such a numerous body, although there is no 'common title', nor 'community of right' or of 'interest in the subject matter' among these individuals, but where there is and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy," then equity will give relief by compelling the multitude to consolidate the case into one suit in equity for the adjustment of the rights of all parties. The view expressed by Pomeroy in the foregoing is referred to by his disciples as the "liberal view".

This was the situation when the now celebrated case of *Tribette v. Illinois Central R. R. Co.*[13] was decided.

The facts in the case are simple. A number of different owners of property destroyed by fire caused from sparks emitted by the engine of the railroad, severally sued in the circuit court to recover of the railroad damages for the respective losses occasioned by the fire, which was alleged to have resulted from negligence on the part of the railroad company.

While these actions were pending, the railroad company exhibited its bill against the several plaintiffs, charging that no liability as to it arose by reason of the fire, which arose, not by any negligence of it or its servants, but from the fault of others; for which it was not responsible; and further charged, that the plaintiffs in the different actions were wrongfully seeking to recover damages, all of which grew out of the same occurrence, and depend for solution upon the same questions of fact and law, and

[13]Illinois Central R. R. Co. v. Tribette, 70 Miss. 182, 12 So. 32 (1892).

therefore to avoid a multiplicity of suits, all of the plaintiffs should be enjoined and brought in, and the controversy settled in one suit in equity. The only common interest here between the plaintiffs is one of fact and law in an act completed in the past.

The defendants in this proceeding upon being served with process, appeared and demurred to the bill, and moved to dissolve the injunction on the face of the bill. The motion on the hearing was overruled and an appeal granted.

The question then presented, was as to the rightfulness of the suit against the defendants, on the sole ground that their several actions at law involve the very same matters of fact and law, without any other community of interest between them.

Campbell, Chief Justice, wrote the opinion of the court which was concurred in by the entire court, and which, has become a leading case on the doctrine therein announced. The court said:

"Where each of several parties may proceed in equity separately, they are permitted to unite and make common cause against a common adversary, and one may implead in one suit in equity many who are his adversaries in a matter common to all in many cases but never when the only ground of relief sought is that the adversaries are numerous, and the suits are for that not in itself a matter for equity cognizance. Attention to the distinction mentioned will resolve all difficulties in considering the many cases on this subject. There must be some recognized ground of equitable interference or some community of interest in the subject matter of the controversy, or common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there 'is a community of interest merely in the question of law or of fact involved,' etc., as stated by Pomeroy in Section 268."[14]

Here for the first time, we have the Pomeroy doctrine sharply, logically and vigorously challenged by a court of last resort. The doctrine had been silently accepted and acquiesced in, by a few courts, no doubt, because of the influence and general acceptance by the bench and bar of Pomeroy's great work on Equity and Jurisprudence. No court had had the temerity or hardihood to oppose his views.

The doctrine announced by Judge Campbell has received the unqualified indorsement of many great courts, as well as law writers, throughout the nation.

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[14]Illinois Central R. R. Co. v. Tribette 70 Miss. 182, 12 So. 32 (1892).

This bit of history connected with the Tribette Case was given the writer by Hon. George J. Leftwich, now deceased, who was a prominent member of the Aberdeen bar and the well-known firm of Leftwich & Tubb; and at one time was president of the State Bar Association of Mississippi, namely, that he was present, together with a large group of lawyers, when the court handed down this celebrated case. The decision was prepared and read by Judge J. A. P. Campbell, the Chief Justice. He stated even before the case was reached, other cases being first disposed of, that there was an indefinable premonition, an intuitive feeling, among all of the members of the bar present, that something unusual, something out of the ordinary, was about to happen. An unusual hush and silence prevailed and this was intensified when the Chief Justice made preparations to read the opinion of the court. The great import of the decision was clearly manifested in the physical appearance of the judge himself, as well as the manner of his delivery.

The faces of the members of the bar, during the impelling and magnetic reading of the opinion, disclosed an unusual interest and tension. It created such a profound impression that even after the judge had completed the delivery of the opinion, a tense silence continued to exist for many minutes. The hush and premonition on the part of the bar, said Mr. Leftwich, as above described, might be likened to the silence which precedes the breaking of the storm in all its fury.

Mr. Leftwich further stated that after leaving the court room, he went directly to the office of Mayes and Harris, counsel for the railroad, and there he found Mr. Mayes walking up and down in his office in state of great agitation occasioned by the holding of the court.

It is a fact that the immediate effect of the decision was most pronounced and precipitated a bitter legal conflict which has not ceased to rage to this good day between those espousing the Pomeroy doctrine and those adhering to the doctrine enunciated in this case by Judge Campbell.

The effect of this great decision and the reaction of the courts, as well as prominent law writers, to it, will best be seen and realized by some citation to important cases, text books, notes, annotations and law journal articles.

In *Turner v. City of Mobile*,[15] Chief Justice McClellan, one of the most learned judges to serve on the Supreme Court of Alabama, said:

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[15]135 Ala. 73, 33 So. 132 (1902).

"We have considered the position of Mr. Pomeroy on this question at length because the views of no text writer of the law are entitled to more consideration than his . . . and because we are disinclined to repudiate any proposition advanced by him without a thorough examination of it.

"The authorities which take a different view of the doctrine under discussion hold, as we have seen, that to authorize numerous persons to unite in one bill for the prevention of a multiplicity of suits, they must have a common title to or a common interest in the subject matter involved, and that a common interest in a question of fact and law involved will not suffice.

"This position is nowhere more fully stated than by Campbell, C. J. in the Tribette Case,[16] and, as the opinion treats fully of Mr. Pomeroy's position, and demonstrates its fallacy, we quote it."

This able opinion by Judge McClellan was overruled in *Southern Steel Co. v. Hopkins*[17] and the *Tribette* case, denounced as being unsound. The court stated it would follow the rule and doctrine laid down in a Mississippi case[18] subsequent to the *Tribette* case, in which it was announced by the court, "We think the doctrine announced by Pomeroy is sound and clearly established by the best modern authorities." The Alabama court further says: "The Tribette Case is directly opposed to our views."

The Alabama court, however, on a reconsideration of the *Southern Steel Company* case,[19] reinstated the doctrine of the Tribette Case, and said:

"We have reached the conclusion that the law has been correctly settled, both in England and America, differently from that declared by this court in the former decision in this case. We think there is little doubt that the courts have been led astray upon this subject by following what Mr. Pomeroy stated in his valuable work on Equity Jurisprudence (2d. Ed.) Sec. 269. Mr. Pomeroy is human and must, therefore sometimes err." The court then concludes:

"We base our conclusion upon the Tribette Case, which we concede to be *the leading authority in the world* (italics, ours) upon the question of the jurisdiction of equity to prevent a multiplicity of suits. It has been reprinted time and again, and copied into the latest editions of most of the text books upon the subject as stating

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[16]70 Miss. 182, 12 So. 32 (1892).
[17]Southern Steel Co. v. Hopkins, 157 Ala. 175, 47 So. 274 (1908).
[18]Hightower & Crawford v. Mobile, J. & K. C. R. R. Co., 83 Miss. 708, 36 So. 82 (1904).
[19]Southern Steel Co. v. Hopkins, 174 Ala. 465, 57 So. 11 (1911).

the true doctrine. This case has been followed by Mr. Bliss (Code Pl., Section 76), by Mr. Beach (Injunctions, Section 543) and Mr. High (Injunctions, Section 65a)."

The court also states that since the *Tribette* case all of the text writers on the subject have revised their texts and seem to follow it, some of them literally quoting it at length; and that Mr. Pomeroy, in the second edition of his work on Equity Jurisprudence, devotes a great deal of attention to the *Tribette* case; because it had so boldly taken him to task on the question under discussion, he added two new sections to that edition, towit, § 251½ and § 251¾, being the only changes made in the text, in order to set himself right. In the notes to his text, Mr. Pomeroy admitted the decision in the *Tribette* case was technically correct, but indulges in some criticism of portions of Judge Campbell's decision.

After the decision in the *Tribette* Case, the doctrine there announced remained the law in Mississippi until 1908, a period of 16 years, when the case of *Whitlock v. Y. & M. V. R. R. Co.*[20] was decided. Judge Campbell at this time had retired from the bench and had been succeeded, as Chief Justice, by Judge Albert Hall Whitfield, who was wedded to the doctrine of Pomeroy.

In 1912 the *Cumberland Telephone & Telegraph Company* case,[21] a history making decision in the field of equity jurisdiction, came before the Mississippi Supreme Court. McLean, Justice, wrote the opinion.

The court in this case delivered a strong and well reasoned opinion in which the doctrine of the *Tribette* Case was restored.

In his opinion the judge had this to say: "The leading case in America combating what may be termed the heresy of Prof. Pomeroy is the Tribette Case, wherein Judge Campbell enters fully into the subject and demonstrates conclusively the unsoundness of Prof. Pomeroy's doctrine—not only by showing that the authorities relied upon by Prof. Pomeroy do not support and sustain him, but that his reasoning is totally unsound." The court says further:

"It seemed at one time the Pomeroy doctrine would be generally accepted, but the second sober thought of the profession was arrested by the masterful and unanswerable opinion of Chief Justice Campbell in the Tribette Case."

In *Vandalia Coal Co. v. Lawson*,[22] Judge Roby copied into his opinion practically the whole of Judge Campbell's opinion, and

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[20]Whitlock v. Y. & M. V. R. R. Co., 91 Miss. 779, 45 So. 861, (1908).
[21]Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559 (1912).
[22]Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47, (1909).

among other things said: "Pomeroy's conclusions are reviewed and controverted in the much famed Tribette Case. The opinion in this case has been reprinted and quoted from many times in the cases and texts. The controversy between this case and Pomeroy was continued in the last edition of the latter by the addition of two new paragraphs (the only new paragraphs in the entire edition). See Sections 251½ and 251¾."

The court in *First State Bank v. Chicago R. I. and P. R. Co.*,[23] speaking through Judge Kenyon, says, in the *Tribette* case, Chief Justice Campbell, in a "strong opinion combatted the doctrine of Pomeroy with unusual vigor" and then proceeds to quote extensively from the case. The court further states in this case, "in Watson v. Huntington (CCA. 2), 215 F. 472,[24] the Court of Appeals of the Second Circuit followed the Tribette Case."

The court further commenting on the late and important case of *Georgia Power Co. v. Hudson*[25] says, "this case seems to follow the Tribette Case."

In the *Watson* case, the court approves in no uncertain terms the holding in the *Tribette* case, and calls attention to the fact many text writers have followed the doctrine announced in this case.

Judge Rogers in *Kansas City Southern Ry. Co. v. Quigley*,[26] referring to the *Tribette* case, said, "the opinion was written by Chief Justice Campbell, justly esteemed as one of the ablest judges on the bench in this country."

The Supreme Court of Tennessee in the celebrated case of *Ducktown Sulphur, Copper and Iron Co. v. Fain*,[27] quoting extensively from the *Tribette* case, among other things says: "This question arose and was thoroughly considered in a very vigorous opinion by Chief Justice Campbell. We believe the true rule is that stated by Judge Campbell and observance of it makes clear a very complicated subject."

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[23]First State Bank v. Chicago R. I. & P. R. Co., 63 F. (2d) 585 (C. C. A. 8th, 1933).

[24]Watson v. Huntington, 215 Fed. 172, 476, 484, 495 (C. C. A. 2d, 1914).

[25]Georgia Power Co. v. Hudson, 49 F. (2d) 66, 69 (C. C. A. 4th, 1931).

[26]Kansas City So. Ry. Co. v. Quigley, 181 Fed. 190 (C. C. W. D. Ark. 1910).

[27]Ducktown Sulphur, Copper and Iron Co. v. Fain, 109 Tenn. 56, 70 S. W. 813 (1902).

It would unduly tax this paper to cite and quote, which might be done, from further cases touching this great case. If one wishes to pursue the subject further, the cases below cited will prove of interest.[28]

Case notes in which the *Tribette* case is cited, favorably commented upon and approved are numerous.[29]

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[28]Barston v. Mingo Drainage Dist., 264 Fed. 224 (E. D. Mo. 1920); Barston v. Mingo Drainage District, 284 Fed. 52 (C. C. A. 8th, 1922); Roanoke Guano Co. v. Saunders, 173 Ala. 347, 56 So. 198 (1911); Squires v. New Amsterdam Casualty Co., 187 Ark. 467, 60 S. W. (2d) 185 (1933); Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423 (1913); Ballew v. Mo. Pac. Co., 288 Mo. 473, 232 S. W. 1015 (1921); Lehigh Valley R. R. Co. v. McFarland, 31 N. J. Eq. 730 (1879); Logan v. Equitable Trust Co., 145 Ore. 684, 29 P. (2d) 511 (1934); Int. Paper Co. v. Bellows Falls Co. 88 Vt. 93, 90 Atl. 943 (1914); National Tube Co. v. Smith, 57 W. Va. 210, 50 S. E. 717 (1905); Illinois Steel Co. v. Schroeder, 133 Wis. 561, 113 N. W. 51, 14 L. R. A. (N. S.) 239 (1907); Johnson v. Swanke, 128 Wis. 77, 107 N. W. 481 (1906). The court in Logan v. Equitable Trust Co., *supra,* says the trend of authorities is that there must be at least some well recognized ground of equitable interference, etc.; Watson v. Huntington, 215 Fed. 472 (C. C. A. 2nd, 1914); Pittsburg & W. Va. Ry. Co. v. United States, 6 F. (2d) 646, (W. D. Pa. 1924); Railway v. McFarland, 31 N. J. Eq. 730 (1879); French v. Standard Mining Co., 133 Va. 602, 114 S. E. 121 (1922). Court announces the trend of judicial decision is toward confining the jurisdiction within narrower limits than would be permitted by Pomeroy's view. Hamilton v. Ala. Power Co., 195 Ala. 438, 70 So. 737 (1915), (Court says, "the early English cases which indicate that a community of interest in the subject matter is not essential to the equity of this bill cannot influence a decision of this case contrary to the weight of modern authority.") Tribette case is discussed in Logan v. Equitable Trust Co., *supra,* (case comments on Tribette case and speaks of it advocating a "restricted doctrine" in that the jurisdiction extends only to prevent numerous suits where already an independent right in equity exists); Wharton v. First Nat. Co. of Birmingham, 230 Ala. 421, 161 So. 825 (1935). See note (1906) 126 Am. St. Rep. 977, where the annotator states in his conclusion: "It seems a majority of the state courts sustain the doctrine that a community of interest must extend to the subject matter and that a community of interest in law and fact involved will not be sufficient to justify equity jurisdiction."

[29]In the annotation to the Southern Steel Company case, 20 L. R. A. (N. S.) 853 (1908) the annotator speaking of the Tribette case, said, "this position is nowhere better or more fully stated than by Campbell, Chief Justice. The opinion treats fully of Mr. Pomeroy's position and demonstrates its fallacy."

In (1931) 75 A. L. R. 1446 the annotator says: "Mr. Pomeroy took the position that a community of interest in the subject matter was not essential, but he was taken to task by Judge Campbell in the famous Tribette Case.

On page 1447 of the same volume the annotator further says: "the leading American authority for the rule that the avoidance of a multiplicity of suits by different individuals to recover damages individually suffered by them, which are ascribable to the same tortious act, is not ground for invoking equitable aid, is the Tribette Case."

In (1933) 90 A. L. R. 554 the following annotation is found: "for those interested in the general subject, reference is made to the careful analysis of Pomeroy's position and of the line of authorities opposed thereto—the leading one being found in the opinion of Campbell, Ch. J., in the Tribette Case."

See the following notes and annotations in which the case is favorably discussed: Notes (1892) 35 Am. St. Rep. 642, 649; (1907) 126 Am. St. Rep. 1001, (IV Conclusion); (1908) 131 Am. St. Rep. 20, 30, 33, 45; (1908) 14 L. R. A. (N. S.) 239; (1908) 20 L. R. A. (N. S.) 848; (1910) 28 L. R. A. 743; (1911) 32 L. R. A. (N. S.) 943; (1911) 34 L. R. A. (N. S.) 897; (1912) 40 L. R. A. (N. S.) 465; 19 Am. Jur. 91 § 78, *et seq.*

In many of the leading law journals of the nation will be found articles of importance and worth, which discuss the *Tribette* case and the doctrine therein enunciated. Some of the most important are listed in the footnote.[30]

All text writers on the subject of Equity Jurisprudence under the head of bills of peace or multiplicity of suits discuss the doctrine of the *Tribette* case.[31] The more modern text writers clearly indicate a trend in the court decisions to the doctrine as announced in the *Tribette* case. They, in some instances, do not accept the doctrine in its entirety, but do approve the fundamental principle involved.

In every case book on Equity Jurisprudence will be found this case. Many of them in addition to the printed case add extensive notes.

Professor Keigwin in his late case book makes the statement that the recent authorities confine the jurisdiction for the avoidance of multiplicity within narrow bounds, "and almost (if not all)

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[30]Prof. Zechariah Chafee, Jr.. in (1931) 45 HARV. L. REV. 1297, has given to the legal profession, a most interesting and scholarly article on *Bills of Peace with Multiple Parties*. Prof. Chafee gives the origin of bills of peace and then discusses at length the Tribette case. He does not agree at all points with the doctrine in that case. He suggests something of a middle course which might be followed, with profit, and thinks the suggested course more practical in dealing with multiple party problems.

In (1914) 24 YALE L. J. 642, appears a leading article on *The Jurisdiction of Equity Relating to Multiplicity of Suits*. The author of this article is Judge R. V. Fletcher, who formerly was Attorney General of Mississippi, and subsequently Associate Justice of the Mississippi Supreme Court. Later, after resigning from the bench he was employed as Chief Counsel of the Illinois Central R. R. lines with offices in Chicago, Illinois. Judge Fletcher discusses in a most able and interesting manner the doctrine of the Tribette case.

In the proceedings of the Kansas State Bar Association for 1938, p. 164, appears an able address by Hon. Schuyler Jackson. The subject of the address is *Jurisdiction in Equity Based upon the Prevention of Multiplicity of Actions*. Mr. Jackson, in the main, agrees with and approves the holding in the Tribette case.

The following law journals contain interesting short discussions and notes prepared by various individuals, all dealing with the Tribette case: Notes (1901) 14 HARV. L. REV. 611 (opposed), (1907) HARV. L. REV. 208 (argues weight of authority is against), (1932) 46 HARV. L. REV. 851 (favorable), (1931) 16 MINN. L. REV. 679 (suggests a middle course), (1933) MISS. L. J. 434, (1935) 11 NEB. L. BULL. 161 (discusses principle), (1932) 62 U. OF PA. L. REV. 452 (suggests a middle course), (1919) 68 U. OF PA. L. REV. 167 (favors), (1915) 3 VA. L. REV. 545 (favorable), (1937) 24 VA. L. REV. 925 (discusses doctrine).

[31]1 POMEROY, EQ. JUR. (2d ed. 1892, 3d ed. 1905, 4th ed. 1918); 2 LAWRENCE, EQUITY JURISPRUDENCE (1929) § 1032; WALSH, EQUITY (1930) § 118; McCLINTOCK, EQUITY (1936) § 170, (Prof. McClintock says: "but the statement of Pomeroy is too broad in one respect. It is not in accord with the best reasoned decisions that the relief should be given whenever there is a common question of law or fact involved in numerous actions at law"; EATON, EQUITY (1901) 38; GRIFFITH, MISS. CHANCERY PRACTICE (1925) §§ 139, 192, 439, 517.

of the late cases accept, in substance at least, the doctrine of the Tribette case."[32] Legal encyclopedias make mention and discuss both in text and foot notes the *Tribette* case.[33]

The foregoing clearly demonstrate the great importance attached by courts, annotators, text writers and the compilers of case books to this great case and the doctrine therein enunciated. The clarity, strength, and logic of the writer of the opinion have definitely influenced the minds of legal purists and made an unmistakable lasting contribution to this branch of equity jurisprudence.

It has been charged that the Mississippi courts have wobbled on the doctrine, some cases adhering to the Pomeroy rule and some to the rule laid down in the *Tribette* Case. Unfortunately there is much of truth in the charge, but since the decision in *Cumberland Telephone and Telegraph Co. v. Williamson*,[34] *supra*, the court has without the slightest waiver, over and over, adhered to the rule of the *Tribette* case.

The first defection from the rule appeared in the case of *Whitlock v. Y. & M. V. R. R. Co.*[35]

Whitlock and others, fifty in number, instituted separate and independent suits in the Circuit Court, alleging they were passengers on the train of the railroad company, and were unreasonably delayed, through the negligence of the company, and demanded punitive and actual damages. All the claims were based upon the same state of facts and the same law.

A bill was filed in the Chancery Court to restrain the separate prosecution of all these suits and prayed that all be consolidated in one suit in equity. Demurrer to the bill was overruled and the case appealed.

The only point considered by the court on appeal was the jurisdiction of the equity court. Whitfield, Chief Justice, rendered the opinion. He said: "It is clearly and thoroughly settled by the best considered modern decisions in this state and elsewhere, that such jurisdiction exists in all cases of this character. See Railroad Co. v. Garrison, 81 M. 264, 32 So. 996, and Crawford v. M. J. and K. C.

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[32]KEIGWIN, CASES ON EQUITY JURISPRUDENCE (1933) 239. Prof. Keigwin is a member of the law faculty of Georgetown University.

[33]19 AM. JUR. 90-96 §§ 77-83 and notes; 10 R. C. L. 283. The discussion is to the effect that the great weight of authority is on the side of the Tribette case.

[34]101 Miss. 1, 57 So. 559 (1912).

[35]91 Miss. 779, 45 So. 861 (1907). A period of 16 years had elapsed since the decision in the Tribette case. Judge Whitfield had been previously Professor of Law at the University of Mississippi and had used Pomeroy's text in his classes.

R. R. Co., 83 Miss. 708, 36 So. 82, 102 Am. St. Rep. 476, and Pollock v. Okolona Savings Bank, 61 Miss. 293." These three cases constitute the only authority cited to sustain the rule laid down by the court. The cases do not bear out the learned judge when he says, "it is clearly and thoroughly settled . . . in this state . . . that such jurisdiction exists."

It is well established that where there is an injury, *continuing* in its nature, which results in the bringing of numerous actions against a person, equity takes jurisdiction to prevent a multiplicity of suits. In the *Garrison* case, first cited, as an authority, the railroad was a defendant in several actions for trespass.

The injury complained of was a *constantly recurring one* and plaintiffs had previously sued for the trespass and intended to continue to do so in the future. This case is very different from the facts in the *Tribette* Case, said the court in commencing the opinion. Judge McLean in the *Cumberland Telephone* case, in speaking of the *Garrison* case, said, "the distinguishing difference between the *continuing nature of the injury* and the principle announced in the Tribette case was expressly recognized."

This distinction was also drawn in *Warren Mills v. New Orleans Seed Co.*[36]

The court laid down the rule in the case that if the trespass is continuous in its nature, "and repeated acts of trespass are done or threatened . . . and the legal remedy therefor be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction."

The fact that one, or multiple parties, are vexed and harrassed by continuous suits, clothes the party or parties with an equity which can be asserted by filing a bill in equity to enjoin the continuous suits and unite all in one suit in equity for a full, complete and final adjustment of the rights of one or all in the one suit.

The *Crawford* case[37] is not inconsistent with the *Tribette* case. It was decided by Whitfield, C. J. In that case 57 individuals had given separate notes to a railroad company to induce it to build its line of road through the city of Hattiesburg. After the notes had been delivered it was learned the railroad company, even before the execution of the notes, had decided to build its line through Hattiesburg. The notes were clearly executed upon knowingly fraudulent representations, made by the officers of railroad company with the result there existed no consideration for them.

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[36]Warren Mill v. New Orleans Seed Co., 65 Miss. 391, 4 So. 298 (1888); Bishop Brothers v. Rosenbaum, 58 Miss. 84 (1880).

[37]Crawford v. M. J. & K. C. R. R., 83 Miss. 708, 36 So. 82, 102 Am. St. Rep. 476 (1904).

The execution of the notes, therefore, grew out of the same transaction, but their validity depended upon the same principles of law. The bill filed prayed that the notes be delivered up and cancelled. The fraud charged in the bill was not denied. The allegations of the bill and the relief prayed gave an equitable right to the makers of the notes and clothed the equity court with jurisdiction to hear and determine the case. The case can, in no sense be regarded as an authority for the holding of the court on the facts in the *Whitlock* case.[38]

McLean, J., in the *Cumberland Telephone & Telegraph Co.* case, says the *Pollock* case,[39] was a case peculiarly of equity jurisdiction, independently of the question of multiplicity of suits. However, the court seemed to base its decision on the Pomeroy rule, and further, to approve the authority of Mr. Pomeroy, yet the real basic ground for the decision was the presence of the independent equity.

These three cases have been erroneously cited, numerous times, by courts and text book writers as being opposed to the *Tribette* case, this view no doubt influenced and induced, by Judge Whitfield's opinion in the *Whitlock Case.* A careful analysis of the facts in these three cases unequivocally demonstrates there was present in each an independent equity which gave to the court jurisdiction without having to resort to a multiplicity of suits as a basis for its jurisdiction. The *Tribette* Case might properly have been cited as an authority in each of these cases.

The case of *Thames v. Mangum*[40] has at times been cited as stating a doctrine contrary to the *Tribette* case.

This suit was brought for the cancellation of deeds, the partition and sale of lands. In such suits the court is expressly clothed with power to "adjust the equities between and determine all claims of the several co-tenants."[41]

Equity assumed jurisdiction here because of the legislative act empowering it to do so, and not because of an equity arising by reason of the presence of multiple parties or a multiplicity of suits.

In 1909, Judge Whitfield rendered the opinion in the case of *Gulf & Ship I. R. R. Co. v. Barnes,*[42] which case is often mentioned and cited as being opposed to the *Tribette* case. Such is not the fact. Judge Whitfield emphasized the fact that the case is in no wise analogous to the *Whitlock* case.

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[38]91 Miss. 779, 45 So. 861 (1907).
[39]Pollock & Co. v. Okolona Savings Inst., 61 Miss. 293 (1883).
[40]89 Miss. 575, 40 So. 327 (1906).
[41]Miss. Rev. Code (1892) § 3101.
[42]94 Miss. 484, 48 So. 823 (1909).

The court after stating the facts, uses the following language: "It surely cannot be necessary to do more than thus clearly state the case made by this record, to show that equity has no sort of jurisdiction in the case; that the grounds upon which jurisdiction of equity may be successfully invoked in order to prevent a multiplicity of suits have no existence in this case." The court held specifically that a bill does not lie to compel an adjudication of the claims in one suit to avoid a multiplicity of suits, since the same law and facts do not apply to all the claims. The court, however, in this case, commits itself wholeheartedly to the doctrine of Pomeroy, but this part of the opinion is *obiter dicta* and clearly not the *ratio decidendi*. It is surplusage, and has nothing in the world to do with the fundamental basis for the decision of the case. Judge Whitfield simply seized upon the occasion openly and fearlessly to express his approval of the Pomeroy doctrine, which, for some reason, he had not heretofore done, and at the same time voice his opposition, in no uncertain terms, to the doctrine of the *Tribette* case.

The opinion in the case of *Blumer v. Ulmer*[43] was written by Edward Mayes, Special Judge. Judge Mayes had been of counsel for the railroad in the *Tribette* case. Briefly, the facts in the case are: Ulmer and others were depositors in the Scranton State Bank, which went into the hands of the receiver. They filed a bill in chancery against Blumer *et al*, directors of the bank, charging the bank had been insolvent for a long time prior to its failure; that the directors deceived the depositors by representations, which were relied on as to solvency and were thereby induced to make deposits in the bank; that the directors knew of the insolvency, which they concealed and charged fraud in the administration of their trust and their liability to the depositors.

The question was raised as to whether the chancery court had jurisdiction and if the bill would lie.

Judge Mayes said: "As to the question whether the bill will lie, although the cause of action of each depositor, if asserted alone, would properly be at law, and not in equity, we hold that the equity jurisdiction was conferred for the prevention of multiplicity of suits," citing the *Crawford* case. If this case is authority for the rule in the *Whitlock* case, one wonders why it was not mentioned in that case along with the *Crawford* case.

Another decision rendered by Judge Whitfield, which adopts the Pomeroy doctrine, is the *Tisdale* case.[44] On the facts, this is a case where a druggist insured in three different companies against

[43]40 So. 161 (Miss. 1907).
[44]Tisdale v. Ins. Co. of North America, 84 Miss. 709, 36 So. 568 (1904).

loss by fire. The building, subsequently was destroyed by fire with a partial loss of the stock of merchandise. The druggist filed three separate suits, one against each company, in the law court.

The companies filed a joint bill in chancery and prayed that the three suits be consolidated in one suit, on the theory each separate suit was based on the same facts and the same principle of law was applicable to each. The court held the equitable jurisdiction was maintainable on the ground of the prevention of a multiplicity of suits, as well as, the inadequacy of the remedy at law. The *Crawford* case, was cited as authority. The *Tisdale* case as will subsequently appear, has been overruled.

The foregoing cases, which follow the Pomeroy doctrine under the influence of Chief Justice Whitfield, who was an ardent admirer and disciple of Pomeroy, are the only cases to be found among the Mississippi decisions which espouse his doctrine. Judge Whitfield was a learned judge, strong and forceful, as a rule, but, in the opinions he wrote espousing the Pomeroy doctrine, there seemed to be lacking that zeal, earnestness and strength which usually characterized his opinions. He was ambitious, no doubt, to see the Pomeroy doctrine firmly established as a part of our jurisprudence, and the doctrine of the *Tribette* case discarded. In this he was disappointed for within less than one year after he retired, the case following was decided and the Pomeroy doctrine was forever doomed in Mississippi.

In *Cumberland Telephone and Telegraph Co. v. Williamson,* Judge McLean, in a most able and exhaustive opinion, reviewed and analyzed all of the authorities upon the subject of the jurisdiction of equity relative to a multiplicity of suits.

It has been said of this case, "The reasoning of this opinion is flawless, and the law of this state upon this much discussed subject was announced to be as it was announced by Judge Campbell in the Tribette Case."

The Mississippi cases which have followed this case are too numerous to attempt even a slight review and analysis of them all. It is sufficient to say they uniformly, without the slightest waver or modification, follow the *Tribette* case, and each is a reannouncement, a reaffirmation or an approval of the doctrine of that case in all of its purity. It is not too much to say that this doctrine has not only become a classic in our courts, but in other courts as well. It has become a part of the warp and woof, a part of the very fiber of our law on the subject of the jurisdiction of equity in cases involving a multiplicity of suits. It will doubtless remain embedded in our law for generations to come.

The Mississippi cases, supporting and maintaining the doctrine of the *Tribette* case, for convenience, and a better understanding of the doctrine, may be easily and readily placed in four separate and distinct classes; yet each class is controlled by the rule enunciated in that case, and clearly falls within the doctrine of the case.

The first class includes cases similar and analogous, as to facts and law, to the *Tribette* case, that is, cases where the transaction out of which the law actions arose constituted a single completed past act involving a common interest among the several parties, only of fact and law, where a full, complete, and adequate remedy at law existed.[45]

The second class consists of cases[46] where the wrong and injury inflicted was of a continuing nature, which resulted in the necessity of bringing repeated and numerous actions at law. Here the law court could not bring the litigation to a finality, but left the defendant to be vexed and harassed by continued litigation. Equity early interfered in such cases, enjoined the prosecution of repeated suits, drew all parties into one suit, adjudicated their rights and brought an end to the litigation. The exercise of the jurisdiction of equity to prevent a multiplicity of suits in such cases

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[45]Newton Oil and Mfg. Co. v. Sessums, 102 Miss. 181, 59 So. 9 (1912); Gulf and S. I. R. R. Co. v. Walker, 103 Miss. 836, 60 So. 1014 (1913); N. O. & N. E. R. R. Co. v. Martin, 105 Miss. 230, 62 So. 228 (1913); Newell v. I. C. R. R. Co., 106 Miss. 182, 63 So. 351 (1913). In the last case a large number of passengers on an excursion train, injured by the negligence of the railroad, filed separte suits in the law court for the alleged damages suffered. The railroad Co. sought an injunction against the prosecution of these various suits and prayed in the bill that they be consolidated in one single suit in equity. The court held: "the plaintiffs in the original suits could not have joined their causes of action in one suit and the defendant cannot accomplish this result by any procedure known to law". Henry, Ins. Comm'r. v. Donovan, 148 Miss. 278, 114 So. 482 (1927); Miller v. White, 160 Miss. 32, 133 So. 144 (1931); Miss. Power Co. v. Ballard, 166 Miss. 631, 146 So. 874 (1933).

[46]Guice v. I. C. R. R. Co., 111 Miss. 36, 71 So. 259 (1916). Smith, C. J., in his opinion in this case said: "Each of the appellees had the right to separately invoke the aid of a court of equity in order to prevent the bringing against it of a multitude of suits by appellant Guice, for the reason that the wrongful conduct on their part of which he complains, is 'continuing in its nature'," citing the Garrison, Tribette, and Tel. & Tel. Co. cases. Y. & M. V. R. R. Co. v. McConnell, 127 Miss. 581, 90 So. 321 (1922). The relief sought in this case was the abatement of a continuing nuisance common to each complaint. Sykes, J., said the maintaining of this bill comes squarely within the rule announced in the Tribette case, the leading case in this country upon the subject. Henry v. M. & O. R. R. Co., 163 Miss. 354, 142 So. 11 (1932). This case grew out of the act of the railroad Co. filling a trestle across a branch of a creek, thereby frequently causing the overflow of the lands of certain parties. Injunction was asked to restrain actions by land owners pending and threatened. Court cites the case of Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559 (1912), and says the jurisdiction of equity to intervene to prevent a multiplicity of suits where there is an injury continuing in its nature which results in the bringing of numerous suits is well recognized. Tribette case cited.

is well illustrated in the *Warren Mills* and *Garrison* cases. The rule in these cases in no way conflicts with the doctrine in the *Tribette* case. Judge Whitfield, purposely and with care, clearly differentiated the *Garrison* case from the *Tribette* case.

It should be thoroughly understood that the *Tribette* case does not condemn the taking of jurisdiction by equity to prevent a multiplicity of suits; it simply limits the jurisdiction, as is clearly set out in the case itself. Courts and law writers speak of it as bringing into existence a "restricted doctrine", as opposed to the "liberal doctrine" of Pomeroy which gives jurisdiction to the equity courts to prevent a multiplicity of suits where the only common interest between the parties is one of law and fact. Prof. Chafee says, "the opening broadside for the liberal view was fired by Pomeroy in 1881". It can be said with equal truth, the opening barrage was laid for the restricted view by Judge Campbell in 1892.

The third class is composed of cases where the parties may be joined in equity in one suit, for the reason that the interest and liability of the defendants or complainants, though separate, "flow from the same fountain, or radiate from the same center, or have a common connecting link".[47]

The fourth class involves insurance cases where a party has insured his property in several different companies. The property is destroyed and the insured then brings separate suits at law against the insurers. The insureres file a joint bill in equity and seek to have all the suits consolidated in one suit in equity.

These cases might fall within one of the three classes already mentioned, but it is believed it will add clarity to the discussion to group them in a class by themselves.

The first case to come before the court was *Tisdale v.* 3 *Insurance Companies.*[48] This case has been reviewed along with that group of cases decided by Judge Whitfield in which he applied and

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[47]Roberts v. Burnwell, 117 Miss. 451, 78 So. 357 (1918); Middleton v. Howell, 127 Miss. 880, 90 So. 725 (1922); These cases cite as authority the Tribette case, 70 Miss. 182, 12 So. 32 (1892); Ill. Cent. Railway Co. v. Garrison, 81 Miss. 257, 32 So. 996 (1902); Crawford v. Mobile. J. & K. C. R. R. Co., 82 Miss. 708, 36 So. 82 (1904); Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559 (1912). Johnson v. Staple Cotton Co-op. Ass'n., 142 Miss. 312, 107 So. 2 (1926) cites the Tribette and Tel. & Tel. Co. cases, *supra.* Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 879 (1927) cites as authority Robertson v. Monroe Co. 118 Miss. 541, 79 So. 147 (1918) and also Tribette case, Tel. & Tel. Co. case, Garrison case, and Crawford case, all *supra*, and GRIFFITH, MISS. CHANCERY PRACTICE (1925) §§ 197-206. Knight v. Upton, 159 Miss. 262, 130 So. 475 (1930) cites as authority the Tribette case, Burwell case, and the Tel. & Tel. Co. cases, *supra.* Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935).

[48]84 Miss. 709, 36 So. 568 (1904).

upheld the doctrine of Prof. Pomeroy. It is therefore unnecessary to discuss the case further but make mention of it, as properly falling within the fourth class of cases.

This remained the law in Mississippi in such cases until the *Warren-Gee Lumber Co.* case[49] came before the court. The facts in the case are very similar to the facts in the *Tisdale* case. The court held among other things, that it was not material that each jury, in separate suits at law on these policies, might fix the value of the property insured at a different sum. The court further stated that while it was true the policies contained the same co-insurance clause, still they are independent contracts, the liability of one company in no wise being affected by the liability of any other company. There is present no ground for an accounting or for contribution, the contract making no provision for either.

The *Tisdale* case, said the court, was clearly overruled necessarily by the *Cumberland Tel. & Tel. Co.* case, "and that it may no longer mislead is now expressly overruled."

Numerous other courts have held as the court did in the *Warren-Gee* case.[50]

It might be worthwhile and proper at this stage of the discussion to make mention of the *rationale* of the two foregoing doctrines.

Mr. Pomeroy in discussing the doctrine which he enunciates in his valuable work, lays down the proposition as being fundamental that the mere presence of a multiplicity of suits, within itself, does not create a cause of action. He asserts there must exist a prior existing cause of action in the party invoking the rule, either equitable or legal, but this cause of action and the existing right to relief need not necessarily be equitable in its nature.

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[49]Scottish Union and Nat. Ins. Co. v. Warren-Gee Lbr. Co., 103 Miss. 816, 60 So. 1010 (1913). See note 34 L. R. A. (N. S.) 897 (the annotator says the weight of authority upholds Warren-Gee Lbr. Co. case, *supra*); See also 98 A. L. R. 871, and authorities there collected. Mechanics Ins. Co. v. Hoover Distilling Co., 177 Fed. 888 (C. C. A. 8th, 1909). Court holds: "several insurance companies having policies providing for proportioned liability on property in which a loss has occurred cannot join in a bill of equity to enjoin assured from maintaining actions at law on the theory they will thereby save a multiplicity of suits". Tribette case cited. Notes (1911) 32 L. R. A. (N. S.) 941.

[50]Scottish Union, etc. Ins. Co. v. Nohlman Co., 73 Fed. 66 (S. D. N. Y., 1896); Mechanics Ins. Co. v. Hoover Distillery Co., 173 Fed. 888, 400 (C. C. A. 8th, 1909); Scruggs & Echols v. Am. Cent. Ins. Co., 176 Fed. 224, (C. C. A. 5th, 1910): note (1910) 36 L. R. A. (N. S.) 92. (Tribette case cited in text of case and in note.) The court in the Scottish Union, etc., Ins. case, *supra*, said: "The system of jurisprudence and procedure which is known to the courts and lawyers as 'equity' is a good thing, but justice and fair dealing are better." See note (1935) 98 A. L. R. 169.

He argues the legal remedy is inherently and fundamentally imperfect in its very nature, requiring as it does, in such cases, many separate independent actions at law.

The fact that there is no link of common interest between or among the parties in the subject matter of the action, but only a common interest in the facts and law of the case and the remedy at law required a multiplicity of suits, is all that is necessary to clothe the equity court with jurisdiction to consolidate the parties into one suit in equity for the adjustment of their rights. The remedy at law is inadequate, says Pomeroy, and this one fact alone is and was one of the basic reasons for equity taking jurisdiction in its very beginning.

Judge Campbell, in the *Tribette* case, was the first authoritative voice raised to combat this doctrine of Pomeroy and to declare "no such doctrine could be found in the books." He reviewed and analysed every case cited by Pomeroy to maintain his doctrine, and both made clear and established the fact that every case cited by Pomeroy to uphold his text "will be found to be either where each party might have resorted to chancery, or been proceeded against in that forum or to rest on some recognized ground of equitable interference other than to avoid a multiplicity of suits."

Judge Campbell says the cases establish this proposition, namely, "where each of several may proceed, or be proceeded against, in equity, their joinder as plaintiffs or defendants in one suit is not objectionable." This is quite different from the question of the joinder of several parties as plaintiffs or defendants because the actions at law grow out of the same act or occurrence, and depend on the same identical facts and law.

Judge McLean in the *Cumberland Tel & Tel. Co.* case, fully sustains Judge Campbell's contention. He says Campbell "demonstrates the unsoundness of Prof. Pomeroy's doctrine," not only that the authorities relied on by Pomeroy did not support his contentions, but that his reasoning was unsound.

Continuing, Judge McLean says, "we have taken the pains to examine for ourselves all of the cases relied upon by Pomeroy and cited in the second edition of his most valuable and excellent treatise and we unhesitatingly concur with Judge Campbell," as stated in the *Tribette* case, that "every case he cited to support his text will be found to be either where each party might have resorted to chancery or be proceeded against in that forum or to rest on some recognized ground of equitable interference other than to avoid a multiplicity of suits."

In notes[51] to *Southern Steel Co. v. Hopkins*, the annotator in discussing Pomeroy's arguments, says, "a search fails to reveal any case which on the facts sustains the proposition, if applied to actions for breach of contract or the commission of a tort, and Pomeroy cites no such case."

Prof. Chafee of the Harvard Law School in a most interesting and scholarly article on "Bills of Peace with Multiple Parties," appearing in the *Harvard Law Review*,[52] discusses at great length the *Tribette* case and in a large measure agrees with Judge Campbell that the authorities cited by Pomeroy to maintain his doctrine fail to do so. "Pomeroy," he says, "overstates his authorities, some of his cases fall into groups previously discussed, where there is some independent ground for equitable relief present, so that they do not squarely support his position that a multiplicity of suits alone is a reason for getting into equity. Pomeroy got as good as he gave from Campbell".

Robert V. Fletcher in a very common sense and practical discussion of "The Jurisdiction of Equity Relating to Multiplicity of Suits," which will be found in the *Yale Law Journal*,[53] comments:

"The able student of the common law who wrote the opinion of the Mississippi court in the Tribette Case, doubtless the leading case in opposition to the Pomeroy doctrine, was able to score heavily against the text of Pomeroy, by showing that many, if not all, of the cases cited in support of the text could be explained upon principles not at all in harmony with the view that equity would interpose if thereby a multiplicity of actions at law could be avoided, merely because all the suits depend upon the same state of facts and the same principle of law. And so, a large number of courts have implicity, not to say blindly, followed the lead of the Tribette Case . . . . . ".

The writer does not agree with Judge Fletcher in the criticisms he makes of the *Tribette* case, but is in hearty accord with the above, and a further candid statement he makes, namely, "As we have heretofore intimated, any theory which denies to a litigant the right to have disputed questions of fact in purely legal controversies decided by a jury must be essentially erroneous." This is clearly in line with Judge Campbell's contention.

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[51] 20 L. R. A. (N. S.) 850.

[52] Chafee, *Bills of Peace with Multiple Parties* (1931) 45 HARV. L. REV. 314.

[53] Fletcher, *The Jurisdiction of Equity Relating to Multiplicity of Suits* (1914) 24 YALE L. J. 642.

The foregoing authorities establish the fact that Pomeroy was wanting in authority. He cited a mere congeries of cases of no authoritative value upon which to rest his doctrine and the *rationale* for it which he promulgates.

Mr. Pomeroy answers Judge Campbell's attack in footnotes to subsequent editions of his work. He particularly challenges him on the decision in the *Pollock* case, which was decided at a time when he was on the bench and concurred in the opinion; but as heretofore stated, McLean, J., in the *Cumberland Tel. & Tel. Co.* case, in a careful review and analysis of the same, called attention to the fact that there is present in the *Pollock* case an independent equity which was the real basis for the equity court taking jurisdiction and not because of the mere presence of a multiplicity of suits.

Concluding his criticism of Campbell's decision in the *Tribette* case, Pomeroy admits that, "the Tribette Case has had a following in the 13 years elapsing since the preparation of the third edition of the work".[54] And further this author says, "it has been so frequently reprinted that it appears to call for special notice."

If he had been called upon to do so, he no doubt would have admitted at the time of his fourth edition, 1918, that the *Tribette* case had a largely increased following.

In fact the principle of the *Tribette* case has constantly grown and is now regarded as the general rule on this subject. *American Juriprudence*[55] sums up the matter with the following statement:

"According to some authorities (citing the Crawford case, *supra*), the Chancery Court, in order to prevent a multiplicity of actions, may assume jurisdiction of the suit if a common interest of law and fact exist between the parties.

"The prevailing view, (italics ours) however, is that between or among those who may become parties to the apprehended multiplicity of actions there must exist a community of interest which relates to the subject matter of the controversy, or a right or title which is common to all or dependent on similar facts."

Again, in Section 79, it is said:

"The view has been taken that equity has power, on the ground of avoiding a multiplicity of suits, to take jurisdiction of several actions for damages on account of the same tort. But the court which took this view repudiated it and denied the jurisdiction of equity in such a case."[56]

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[54]1 POMEROY, EQUITY JURISPRUDENCE 482, note.

[55]19 Am. Jur. §§ 78, 79, 80, 82 (1939).

[56]Roanoke Guano Co. v. Saunders, 173 Ala. 347, 56 So. 198, 35 L. R. A. (N. S.) 491 (1911); Southern Steel Co. v. Hopkins, 174 Ala. 465, 57 So. 11 (1911).

"The latter view, that equity has no such jurisdiction in such a case, is the general view."

This statement made in 1939, after a thorough and searching review by a staff of competent and outstanding research workers, who possess the confidence of the bar and judiciary of the nation, demonstrates clearly that the doctrine of the *Tribette* case not only "has had a following", as stated by Mr. Pomeroy, but today, after the lapse of fifty years, it represents the "general view" of the courts on this subject.

Some of the cases have undertaken to give the underlying reasons for the view that equity will not take jurisdiction in the case of a multiplicity of suits, if the only matter common between the parties is that of fact and law. There are variant reasons given, but those which appear the better and most practical are about as follows:

Prior to Pomeroy's text, both in England and America there existed no such doctrine. It is elementary that a party who seeks to come into equity must himself have an equity. It must exist in him, however he may have come by it, or he cannot maintain a bill.

Where his right, title or interest is legal and his defense and remedy are cognizable in a legal forum, he has no capacity or standing in a court of equity.[57]

Jurisdiction in equity is not entertained on a theory or idea that the court itself holds in its hands an equity with which it will graciously endow the party who seeks its forum, regardless of the fact he has no equity himself, or that that it will take jurisdiction to prevent a multiplicity of suits in order to lessen the supposed labor of the common law courts.

Suppose, as an illustration, only one party had been injured in the *Tribette* case growing out of a past and completed act, and this lone party had filed a bill in equity for his remedy. The equity court would have denied him any remedy, because his right was legal and he could secure a complete and adequate remedy in a legal forum. But let us suppose two or three parties had been injured instead of one. Would these two or three parties then be denied their legal right to a common law remedy by the interposition of equity on the naked theory this constituted a multiplicity of suits and that the presence of this new factor, namely, a multiplicity of suits, gave rise of itself alone, to an equity?

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[57]Turner v. City of Mobile, 135 Ala. 73, 33 So. 32 (1902).

It does not appear reasonable in such a case, that a multiplicity of suits alone, with no factor of an equitable nature present in the case could possibly give rise to an equity, especially, where in such cases, the legal remedy is adequate and the plaintiff is entitled to the valuable rights of a legal forum, among which, might be mentioned the jury trial.

There is no vexation or annoyance present in such a case as in a continuing tort, which factor prevents the giving of complete, full and final justice by the law court.

Surely, you cannot by sheer force of judicial authority and power, without the aid of legislative enactment, give the complainant in the above illustration an equity, against all sound and reasonable principles of law or equity.

The complainant in the *Tribette* case is a highly negligent wrongdoer; it has through its carelessness and negligence caused the destruction of the property of the defendants, and, now, when they bring it into the law court to secure justice for the injury done, the wrongdoer turns and says, you may sue me, but I will determine, not you, the forum in which I will answer your complaint. No case in England or America can be found where a tort feasor can invoke the jurisdiction of equity to enjoin suits begun at law for damages for the trespass growing out of a single past act and compel the injured person to join in one suit in equity on the sole ground of a common question of law and fact involved.

This assuredly presents a most unusual situation. McClellan, Ch. J., in the *Turner* case, made the following statement, which for strength and soundness seems unanswerable:

"It is altogether plain and clear to us, Mr. Pomeroy and some few courts to the contrary, that the wholly fortuitous, accidental and collateral fact that numerous other persons have like, but entirely independent and disconnected, legal rights, estates or defenses cannot upon any conceivable principle invest him with any right, legal or equitable, and that his rights, whatever they may be, are precisely the same, as if no other person had similar rights. It is palpably illogical to say that one man may acquire rights of any sort from others with whom he has absolutely no connection or relation by blood or by convention.

"It is palpably non sequitur to say that when numerous persons have like but independent legal estates or legal rights in respect of which severally they have no right to invoke the juris-

diction of chancery, yet, because they are numerous, the separate legal right of each is metamorphosed into an equity right in all, or in one for all."

The foregoing are sufficient grounds for equity refusing to take jurisdiction in order to prevent a multiplicity of suits where there is a mere community of interest in matters of law and fact, but mention will now be made of some highly practical grounds which prevent it assuming such jurisdiction in many cases.

In the *Tribette* case, if all had been drawn into one suit in chancery for an adjustment of their several rights, we would have had the spectacle of but one suit appearing on the docket, yet, in this one suit, there would have been numerous separate and distinct issues growing out of the variant facts, involved, which would have necessitated a separate trial of each issue. This would have constituted a veritable bundle of cases in the one suit with no lessening of the litigation and with costs greater than the aggregate costs in all the suits at law. From a practical standpoint, it was much better to allow each party to pursue his separate action at law. Prof. Pomeroy was forced to admit this, after a study of the decision in the Tribette case, and sought to avoid the force of it by adding Section 151½ to his text, but, unfortunately, he allowed Section 269 of his text to remain as originally written, which nullifies the changes made by Section 151½.

It is argued by the proponents of the Pomeroy doctrine that if there is present but one common issue of fact and law in a case, there exists no practical reason for equity refusing to take jurisdiction and unite all in one chancery suit.

Suppose then, for illustration, a train or bus wreck, where numerous parties are negligently injured, and as, is usual, some of them live in different states, or in different counties in the same state, the practical difficulty to the operation of the doctrine would be the venue statutes. These statutes give to the injured person certain legal rights as to where he may institute his action at law. This would clearly prevent, in such cases, the uniting of all in one suit in chancery unless all voluntarily agreed that it be done. This is pointed out by Judge Campbell in his opinion in the *Tribette* case. If, however, all the injured parties live in the same county and have brought or are threatening to bring separate suits in the law courts and there is present only one common issue of law and fact, will equity take jurisdiction and unite all in one suit? It might, with some degree of plausibility be argued in such a case that the practical administration of justice would be aided by the adoption of such a procedure.

This question is answered in no uncertain terms by our court in the *Newell* case.[58] In this case a large number of passengers were injured in the wreck of an excursion train caused by the negligence of the railroad company.

Several suits were filed in the circuit court against the company for damages. The railroad company exhibited its bill of complaint in the chancery court against all of the plaintiffs in the damage suits, praying for an injunction against the further prosecution of the suits at law, which was granted and the chancery court was asked to take jurisdiction of all the issues involved in the several suits. This the chancery court did. Proper exceptions and objections were taken and an appeal granted to the Supreme Court; and on a review of the case the court said: "We . . . . established the rule in this state that neither the chancery court, nor any other court, has jurisdiction of this sort of suit. The plaintiffs, in the original suits, could not have joined their causes of action in one suit, and the defendant cannot accomplish this result by the procedure here adopted or any other procedure known to law."

It may be further stated, Mississippi is a common law state and the field of equity jurisdiction is fixed and determined by the constitution and statute laws of the state. If a jurisdiction is not found in the constitution and laws, it does not exist, and the mere force of judicial power is not sufficient to confer it. As we have already observed the mere presence of a multiplicity of suits alone, of itself, creates no equity and confers no jurisdiction on the chancery courts.

It has been contended by some that Section 147[59] of the Constitution creates a perfect blend of law and equity and under the provisions of this section, the chancellor is clothed with discretionary power to determine the jurisdiction of the equity court, when once the jurisdiction is assumed of a common law cause of action, though the jurisdiction was taken by reason of error or mistake on the part of the chancellor.[60]

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[58]Newell v. Ill. Cent. R. R. Co., 106 Miss. 182, 63 So. 351 (1913).

[59]MISS. CONST. (1890) § 147: "No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy."

[60]Talbot & Higgins Lbr. Co. v. McLeod Lbr. Co., 147 Miss. 186, 113 So. 443 (1927). It will be noted there is a sharp dissenting opinion in this case.

The answer to this contention is to be found in the *Tribette* case. Judge Campbell discussing this very point said, "No question as to mistake or jurisdiction between courts of law and chancery within contemplation of Section 147 of our Constitution arises in this case; for if we had only one forum, armed with full power to administer all remedial justice, joinder of these parties in one action would not be admissible." Stated in a different manner we have the same holding in the *Newell* case.

The fundamental trouble in such cases is that there exists no community of interest between or among the parties in the subject matter of the suit, or a common right or title involved. What is and what is not a community of interest is well illustrated by Bliss, *Code Pleading* as follows:

"Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with a down flow of water, and may unite to restrain or abate it; but they cannot unite in an action for damages, for as to the injury suffered there is no community of interest."

It was said by the English court, a century and a half ago, that a court of equity will not take cognizance of distinct and separate claims of different persons in one suit, though they stand in the same relative situation as to both the facts and law involved.[61]

There existed no community of interest as to the injuries suffered in the *Tribette* case. If, however, the property damaged in that case had all belonged in common to the defendants brought into the one suit, a clear community of interest in the subject matter would have existed and relief could have been obtained in the equity court.

The above and foregoing holdings in the *Tribette* and *Newell* cases, constitute the law today in Mississippi pertaining to the problems there presented and decided.

The lower federal courts have had occasion quite recently to pass on the question as to whether there is jurisdiction in equity to avoid a multiplicity of suits when there is present only a mere community of interest between the multiple parties of fact and law.

The question was clearly and distinctly answered in the negative.[62]

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[61]Brinkley v. Presgrave, 1 East 220, 227, 102 Eng. Rep. 86 (1801).

[62]Broderick, Supt. of Bank of N. Y. v. Amer. Gen. Corp., 71 F. (2d) 864 (C. C. A. 4th, 1934), 94 L. R. A. 1359, 16 Am. Cas. 694.

Precisely the same question was long ago answered in the negative by the Supreme Court of the United States.[63]

In numerous cases from the courts of other states, it has been held that if only a community of interest in matters of fact and law exist, the constitutional right of trial by jury prevents equity from taking jurisdiction.

It will be seen from the opinions of the court in the *Tribette* and *Newell* cases, that this question will not and cannot arise in such cases in Mississippi.

The court in the *Newell* case pointedly says, "We have definitely, and we think clearly, established the rule in this state that neither the chancery court, nor any other court, has jurisdiction of this sort of suit." The force of this decision takes away all jurisdiction of the courts in such cases and any suit of this nature filed will be dismissed.

CONCLUSION

The foregoing discussion and the decisions cited do not disparage or limit in a proper sense, the remedial side of equity jurisprudence. The problems of equitable jurisdiction discussed are confined within narrow limits and in no wise entrenches on the well established field of remedial equity jurisprudence. This field is broad, elastic, and flexible and still performs and will continue to perform the functions which have aided so materially in the administration of justice. The cases cited do not hamper or limit its beneficent offices to afford a remedy, (1) where the law court gives none and (2) where the remedy at law is so inadequate that full, efficient and complete justice is not done. It will continue to invent and apply entirely new remedies where justice demands it, just as it has done in the past.

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[63]Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380 (1902).

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